

# EMERGENT PROBLEMS AND OPTIMAL SOLUTIONS

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In *Anarchy, State, and Utopia*, Robert Nozick argues that people have natural rights which limit what other people, including agents of the state, may do to them.<sup>1</sup> His argument appeals to our beliefs about when it is permissible for one person acting alone in a state of nature to use force against another person. More specifically, he appeals to our beliefs about when it is permissible for one person to use force against another when we focus on *specific* problems between two people whose moral relations have not been complicated by any of the following: prior state action;<sup>2</sup> nonabundance of natural resources;<sup>3</sup> or the existence of institutions which (i) specify that certain actions are forbidden and others required, (ii) specify that those who act contrary to these pronouncements will be subjected to punishment, and (iii) succeed in fixing people's expectations about how others will act.<sup>4</sup> When we focus on these *specific* problems we will, supposedly, arrive at clear beliefs about what principles should be used to solve them and what "root ideas" justify using those principles.<sup>5</sup> The principles will include a list of natural rights—those held by people in the state of nature and not dependent on the existence of institutions.

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1. R. NOZICK, *ANARCHY, STATE, AND UTOPIA* ix (1974).

2. *Id.* at 4-6.

3. *Id.* at 175-78.

4. *Id.* at 90-95, 204-07. These three assumptions are supposed to aid our judgment by helping us to focus "on micro-situations that we do have a firm grasp of." *Id.* at 204. Furthermore, the first focusing assumption enables us to postpone the difficult question of whether a state may be necessary, as a temporary measure at least, to rectify the injustices that have been caused by prior state action. See *id.* at 230-31.

5. *Id.* at 33.

Nozick's list of natural rights includes: a right to one's body;<sup>6</sup> a right to one's labor;<sup>7</sup> a right to make contracts;<sup>8</sup> a right to whatever property one has legitimately acquired;<sup>9</sup> a right to choose one's life plan;<sup>10</sup> and a right to enforce one's natural rights.<sup>11</sup> He believes that once we understand these rights we will be able to solve many, but not all problems concerning when it is permissible for one person acting alone in the state of nature to use force against another.

Why should we accept Nozick's list of natural rights? He believes that the best explanation must appeal to the following root ideas:

1. No person can be sacrificed for the benefit of any other person.<sup>12</sup>
2. Each person must be treated as an end and never merely as a means.<sup>13</sup>
3. No person is a resource for any other person.<sup>14</sup>
4. Each person is individually responsible for choosing his life plan.<sup>15</sup>

When Nozick concedes that his book "does not present a precise theory of the moral basis of individual rights"<sup>16</sup> he is conceding that he has not established either that his root ideas, as he interprets them, are the appropriate ones for a correct moral theory, or that there are valid arguments in which his root ideas appear as premises and his moral principles, including his account of natural rights, appear as conclusions. In this Article I will, for the purpose of argument, assume that his root ideas are appropriate and that they can be used to establish his account of natural rights. I will examine whether they can also be used to establish other moral principles which determine when it is permissible for one person to use force against another. I will argue that they cannot be used to establish some of the additional principles which are essential to the moral theory which Nozick defends.

### EMERGENT PROBLEMS OF NOZICK'S THEORY

A complete statement of Nozick's position would include a list of

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6. *Id.* at 206.

7. *Id.* at 171.

8. *Id.* at 58, 158.

9. *Id.* at 161.

10. *Id.* at 34, 48-51.

11. *Id.* at 51-52. I do not claim that this right is complete. Nozick might attempt to expand it by arguing for a natural right to privacy and he might attempt to contract it by arguing that the right to contract can be derived from the right to choose one's life plan. It is only included here to give the reader an intuitive idea of the position Nozick accepts.

12. *Id.* at 33.

13. *Id.* at 31-32.

14. *Id.* at 33, 171-72.

15. *Id.* at 34.

16. *Id.* at xiv.

the focusing assumptions which he uses, in addition to the three I have already listed, to isolate the specific problems about which we supposedly have clear beliefs. It would also include an explanation of how Nozick solves the problems concerning the use of force which emerge when we drop one or more of his focusing assumptions. We will call such problems "emergent problems."<sup>17</sup> Many of Nozick's most important conclusions depend upon his solutions to emergent problems. Thus, for instance, his conclusion that the only just state is the night-watchman state which is "limited to the functions of protecting all its citizens against violence, theft, and fraud, and to the enforcement of contracts, and so on" depends upon his solution to the emergent problem of nonabundance.<sup>18</sup> Nozick believes that we have clear beliefs about how to evaluate distributions of natural resources and the benefits which result from their use under conditions of abundance. One such belief is that each person has a natural right to (and, therefore, is entitled to) all that he has legitimately acquired. It accordingly follows that no person, including an agent of the state, is entitled to take any portion of another's acquisitions to provide aid to people whom the owner never consented to aid.<sup>19</sup> There is an abundance of a natural resource when one person's appropriation of a bequeathable property right in some of that resource leaves, in the words of Locke, "enough and as good left in common for others."<sup>20</sup> The emergent problem of nonabundance arises when we drop the assumption of abundance and focus on conditions in which there is not "enough and as good left over." Nozick can defend the nightwatchman state only if he can establish that the solution to this emergent problem includes the principle that each person is entitled to all that he has legitimately acquired.<sup>21</sup>

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17. Although Nozick never uses the expression "emergent problem," he should be at home with the concept of an emergent problem. He claims "that no new rights 'emerge' at the group level." *Id.* at 90. He also asks: "Are the fundamental principles of justice *emergent* in this fashion?" *Id.* at 205.

18. *Id.* at 26. The criticisms which I will develop in this Article are consistent with Nozick's claim that the just state is not permitted to use force in the pursuit of any perfectionist, paternalist, or egalitarian goals. Although they do not threaten Nozick's claim that the only just state is the nightwatchman state, they are important criticisms nonetheless.

19. Although Nozick says very little about the rights of children, *see id.* at 38, 330, he must believe that children have enforceable rights to aid against their parents and that these rights do not depend on the parents' prior consent to provide the aid. Furthermore, we want to know whether it is permissible to take part of what a person has legitimately acquired to aid another so long as the first person is fully compensated for what he gives. In this case no redistribution will occur. I discuss Nozick's position on this issue in the section "Assault and the Principle of Productive Exchange" below.

20. *Id.* at 175; *see J. LOCKE, TWO TREATISES OF GOVERNMENT* 329 (Laslett ed. 1963) (Second Treatise).

21. Actually, Nozick wants to defend the somewhat stronger position that each person is entitled to all that he has legitimately acquired, and that we can determine whether or not a person has legitimately acquired what he has without appealing to

Nozick believes that he can. I will not attempt to evaluate his argument in this Article.<sup>22</sup>

Another emergent problem which plays a critical role in Nozick's theory is the problem of how to resolve conflicts which arise when two or more persons desire to punish the same person for violating the law of nature.<sup>23</sup> Nozick appears to believe that we have clear beliefs, so long as people do not have conflicting desires to punish the same person, that each person has a natural right to punish any person who violates the law of nature. Relative to these beliefs the problem of who has the right to punish when there are conflicting desires is an emergent problem. One solution to this emergent problem is to say that in cases of conflict the right to punish is held jointly by all people.<sup>24</sup> Since it is held jointly we have the additional problem of how to evaluate procedures that determine which people are specially entitled to punish. This solution would undermine the anarchist's doubts, which Nozick takes seriously, about the possibility of providing a justification of the state. A justification of the state is an account of how a state would naturally arise from the state of nature without violating any person's rights. One feature of a state is that it prohibits every person in its territory, even those who do not consent to the prohibition, from privately enforcing the law of nature. The anarchist believes that those who do not consent to the prohibition can justly complain that the prohibition violates their right to enforce natural law privately.<sup>25</sup> If we accept the solution sketched above, however, we can provide a simple answer to this complaint. We merely note that this is a case of conflict and, therefore, a case in which those who complain no longer have the right to enforce the law of nature. Instead, the right is possessed by those who have been selected through the use of the state's just procedures. It is only because Nozick rejects this solution that he becomes preoccupied with the problem of providing a justification of the state.<sup>26</sup>

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any *special* principles for evaluating the economic institutions in which he acquired it. See R. NOZICK, *supra* note 1, at 162 n.

22. I believe that his argument does not work and, furthermore, that the optimal solution to the emergent problem of nonabundance must appeal to something like Rawls' original position. I am presently working on these ideas as part of a project to undermine Nozick's arguments against Rawls' theory.

23. R. Nozick, *supra* note 1, at 138-40.

24. *Id.* at 139.

25. See *id.* at 51-52.

26. Nozick offers a second reason for doubting the possibility of providing a justification of the state. It is that the state provides protection to all the people in its area, including those unable to pay for the protection they receive. How can the state raise the money to pay for this protection without using force to take what some have legitimately acquired and using it to aid others whom they never consented to aid? It appears that the state must violate some people's natural right to all that they have legitimately acquired. This second reason is clearly subordinate to the first. This is because any reasonable explanation of how the state can justify its prohibition on the

Still another emergent problem which plays a critical role in Nozick's theory is the problem of whether people who voluntarily consent to obey the requirements of public rules have the right to enforce those rules against all who benefit from their obedience, including those who never consented to obey them.<sup>27</sup> Nozick insists that it is never permissible to enforce the rules against those who did not voluntarily consent to obey them, regardless of how many benefits these people gain from others' obedience.

Although Nozick recognizes other emergent problems, this Article will concentrate primarily on his solution to the emergent problem of when it is permissible to prohibit a person from doing a nonaggressive act.<sup>28</sup> Nozick views the problem as one of prohibition, compensation, and risk. He writes:

A line (or hyper-plane) circumscribes an area in moral space around an individual. Locke holds that this line is determined by an individual's natural rights, which limit the action of others. Non-Lockeans view other considerations as setting the position and contour of this line. In any case the following question arises: *Are others forbidden to perform actions that transgress the boundary or encroach upon the circumscribed area, or are they permitted to perform such actions provided that they compensate the person whose boundary has been crossed?*<sup>29</sup>

This passage indicates that Nozick believes that our natural rights are absolute, at least to the extent that it is never permissible to cross the boundary defined by another's rights without compensating him for the crossing.<sup>30</sup> This belief leads him to ask the following questions:

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private enforcement of the law of nature, whether it appeals to some version of an enforceable fairness principle, or appeals to the principle of compensation, to which Nozick appeals, must provide those who are prohibited with some form of protection.

27. R. NOZICK, *supra* note 1, at 90-95.

28. Other emergent problems include: the problem of how to treat animals, *id.* at 35-42; the problem of procedural rights, *id.* at 101-08; the problem of preemptive attack, *id.* at 126-30; and the problem of whether there is intrinsic value in punishing the guilty. *Id.* at 96-98. The problem of what rights children possess is also an emergent problem relative to Nozick's account of our clearest moral beliefs.

29. *Id.* at 57 (emphasis in original; footnote omitted).

30. There are three complications with the claim that this is Nozick's position. First, he notes the problem of whether side constraints "may be violated to avoid catastrophic moral horror." *Id.* at 30 n. He does not, however, elaborate on what constitutes catastrophic moral horror. One wonders whether the individualist anarchist could justify the use of force to prevent the emergence of the state on the ground that the long run tendency of any state situation would be a situation of catastrophic moral horror. Second, he makes the puzzling claim, while discussing the utilitarian position on when it is permissible to kill people, that "eptness is hard to come by" with regard to "decisions where the *number* of persons is at issue." *Id.* at 41 (emphasis in original). He never tells us, however, why numbers will pose a problem for his theory, which views rights as absolute side constraints. Perhaps they become relevant in relation to the problems of innocent threats and innocent shields of threats. *See id.* at 34-35. Finally, his discussion of compensation suggests that a person is entitled to full compensation when another crosses his boundary without his consent only when he took reasonable precautions to

1. When is a person forbidden to do an action which threatens to cross (one that is certain to cross or creates the risk of crossing) the boundary defined by another's natural rights?

2. When is a person permitted to do an action which threatens to cross the boundary defined by another's natural rights provided he compensates the person whose boundary is crossed?

Nozick believes that the correct answers to these questions will reveal that natural rights are absolute in the much stronger sense required by "a libertarian side constraint that prohibits aggression against another."<sup>31</sup>

Unfortunately, Nozick never explicitly says what is required by the libertarian side constraint that prohibits aggression, and he never offers a precise account of what constitutes aggression. The following remarks should give the reader an idea of the position Nozick wants to defend:

Political philosophy is concerned only with *certain* ways that persons may not use others; primarily, physically aggressing against them. A specific side constraint upon action towards others expresses the fact that others may not be used in the specific ways the side constraint excludes. Side constraints express the inviolability of others, in the ways they specify.<sup>32</sup>

. . . This root idea, namely, that there are different individuals with separate lives and so no one may be sacrificed for others, underlines the existence of moral side constraints, but it also, I believe, leads to a libertarian side constraint that prohibits aggression against another.<sup>33</sup> . . . Anyone who rejects *that particular* [the libertarian] side constraint has three alternatives: (1) he must reject *all* side constraints; (2) he must produce a different explanation of why there are moral side constraints rather than simply a goal-directed maximizing structure, an explanation that doesn't itself entail the libertarian side constraint; or (3) he must accept the strongly put root idea about the separateness of individ-

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minimize the amount of harm that might result from that type of crossing. *Id.* at 58. He does not, however, elaborate on how we determine what counts as a reasonable precaution. Is it a matter of convention? Are there special principles which apply to the evaluation of conventions? Can a convention be enforced against a person who has not consented to its requirements? No attempt is made to answer these important questions. His only further discussion of the problem of reasonable precautions occurs where he refers to Ronald Coase's Article, Coase, *The Problem of Social Costs*, J.L. & ECON. 1 (1960); *see* R. NOZICK, *supra* note 1, at 76, and where he suggests that airlines might be able to reduce their liability to those whose boundaries they cross when they fly over their homes by offering to soundproof their homes. *Id.* at 80. What becomes clear is that Nozick does *not* defend the view that there is always strict tort liability. Insofar as he believes that each person is responsible for taking reasonable precautions, he leaves room for the concepts of comparative and contributory negligence.

31. *Id.* at 33.

32. *Id.* at 32 (emphasis in original).

33. *Id.* at 33.

uals and yet claim that initiating aggression against another is compatible with this root idea. Thus we have a promising sketch of an argument from moral form to moral content: the form of morality includes *F* (moral side constraints); the best explanation of morality's being *F* is *p* (a strong statement of the distinctness of individuals); and from *p* follows a particular moral content, namely, the libertarian constraint.<sup>34</sup>

What is the relation between these brief descriptions of and arguments for the libertarian side constraint against aggression and the later arguments concerning which actions are forbidden and which are permitted provided that compensation is paid?<sup>35</sup> Nozick never tells us. However, it seems fair to say that the later arguments are intended to supplement the earlier argument—the one from moral form to moral content—for the libertarian side constraint.

The libertarian side constraint certainly forbids every aggressive act which threatens to cross the boundary defined by another's natural rights. An act is forbidden when it is permissible to use force to prevent it and to punish a person for doing it. A person who accepts the libertarian side constraint believes that it is never permissible to do an aggressive act which threatens to cross the boundaries defined by another's natural rights even when the victim of the aggressive act will be compensated for the crossing and the aggressive act is a necessary means for reducing the number of aggressive acts which threaten to cross people's boundaries. Alternatively, Nozick rejects the view that it is permissible to use aggression in pursuit of the laudable goal of minimizing the number of aggressive violations of rights. It should be clear that a person who accepts the libertarian side constraint believes that natural rights are absolute in a very strong sense.

A complete account of what Nozick's commitment to the libertarian side constraint amounts to presupposes an account of Nozick's distinction between aggressive and nonaggressive acts. One of my aims will, therefore, be to extract the account of aggression which appears to be implicit in the book. Once we have identified Nozick's account of aggression and his argument for the libertarian side constraint, we can examine his solutions to two emergent problems: When, if ever, is an aggressive act which does *not* threaten to cross the boundary defined by another's natural rights forbidden? When, if ever, is a non-aggressive act which threatens to cross the boundary defined by another's natural rights forbidden? A second aim of this Article is to

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34. *Id.* at 33-34 (emphasis in original; footnote omitted).

35. *See id.* at 54-87.

show that Nozick's solution to the first problem above is problematic. My third, and most important aim is to show that his solution to the second problem is radically mistaken.

The argument that Nozick's solution is radically mistaken will focus on his belief that the correct solution must be compatible with two very abstract principles. I will call one "the force principle" or "*F*" which provides:

*The Force Principle:* The principles which apply to the problem of when one person, including an agent of the state, is permitted to use force against another are the same as the principles which apply to the more specific problem of when one person acting alone in the state of nature is permitted to use force against another person.

Nozick is clearly committed to *F*. In one portion of *Anarchy, State, and Utopia*, he writes: "The *rights* possessed by the state are already possessed by each individual in a state of nature."<sup>36</sup> In yet another place, Nozick states:

No new rights and powers arise; each right of the association is decomposable without residue into those individual rights held by distinct individuals acting alone in the state of nature.

. . . [N]o new rights "emerge" at the group level, . . . individuals in combination cannot create new rights which are not the sum of preexisting ones.<sup>37</sup>

Nozick's commitment to *F* makes him very reluctant to accept any principle which can be enforced against people without their consent and which can only be satisfied through the establishment of an enforceable public rule (or law) which is designed to coordinate the behavior of many people.<sup>38</sup> We will call a principle which has these two properties "a law bound principle."

A person who believes that there are law bound principles must solve the emergent problem of who is entitled to publish, interpret, and enforce the laws which are needed to satisfy them. Since it is unreasonable to claim that any person acting alone in the state of nature is entitled to do these things, he is likely to adopt the view that law bound

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36. *Id.* at 118.

37. *Id.* at 89-90.

38. Nozick's commitment to *F* does not appear to be absolute. See *id.* at 178-81 (on how to rectify violations of the Lockean proviso which are the cumulative effect of the independent acts of many persons); *id.* at 230-31 (on how to rectify the injustices caused by generations of injustice). In each of these cases he appears willing to say that the correct solution is a solution which can only be enforced by a central authority. He seems unequivocally committed to *F* as a constraint on solutions to the problems which I will discuss in this Article.

principles create the need for the following special principles: First, principles are needed for evaluating procedures which determine which people are specially entitled to publish, interpret, and enforce the laws which are needed to satisfy the law bound principles. We will call procedures which satisfy these special principles "just procedures." Second, a principle is necessary to define a natural duty for each person to do his fair share in establishing and maintaining just procedures. Third, principles are needed which apply to the problem of when a person is obligated to obey laws which result from the use of just procedures and which are intended to satisfy law bound principles. Finally, principles are necessary for evaluating the official conduct of those people who are selected by the use of just procedures to publish, interpret, and enforce the laws that are needed to satisfy law bound principles.

We will call the view which says that there are law bound principles and that law bound principles create the need for the special principles listed above "the natural position." A person who accepts the natural position believes that at least one of the main problems of social justice—the problem of evaluating procedures which determine which people are specially entitled to publish, interpret, and enforce the laws that are needed to satisfy law bound principles—is a problem of institutional design.

One of the significant features of Nozick's moral theory is its rejection of the natural position. This rejection does not follow from a naive belief that there are no important social problems which can only be satisfied through the establishment of laws which are designed to coordinate the behavior of many people. He concedes that these problems exist. He insists, however, that they are properly understood as inconveniences of remaining in the state of nature. They provide each person in the state of nature with a reason to establish a central authority which is given the right to publish and enforce the laws which are needed to solve these problems. People will, in the pursuit of their own interests, voluntarily agree to establish procedures which determine which people are specially entitled to publish, interpret, and enforce the laws that are needed. Whatever procedures people voluntarily agree to are just. No special principles are needed. Only those who consent to these procedures can be forced to obey the laws to which they lead.

Nozick's commitment to *F* is reinforced by his commitment to another abstract principle which I will call "the independence principle" or "*I*:

*The Independence Principle:* It is permissible to use force or the threat of force to interfere with a person's doing an act only when his act is serious enough to warrant interference when considered independently of the acts of others who are acting independently of him.

Nozick never explicitly accepts *I*. There are, therefore, problems in stating it precisely. When, for instance, can we say that one person is acting independently of others who are acting independently of him? Two people are certainly acting independently of each other when neither knows what the other is doing. They are also acting independently of each other when each has a sufficient reason for doing his action which is not dependent on how the other will act. Nozick would even say that one person is acting independently of others in some cases where the first person's reason for doing his action is dependent on his beliefs about how the others will act. He is acting independently so long as he did not voluntarily agree to coordinate his behavior with the others. The free rider acts independently of those whom he takes for a ride.<sup>39</sup> Two people are not acting independently of each other when they have voluntarily agreed to coordinate their behavior.

There can be little doubt that Nozick accepts *I*, or something like it.<sup>40</sup> The best evidence is found in his discussion of cumulative risk.<sup>41</sup> The problem of cumulative risk arises when the result of many persons' independent (nonaggressive) acts is to subject some person to a risk which is so great that any single person would be forbidden to subject him to a risk of that magnitude, and none of the risk-producing acts is serious enough to warrant interference when considered by itself. One possible solution to this problem would say that each person has an enforceable right to be free from risks above a certain magnitude and, therefore, has the right to publish and enforce laws which will coordinate the behavior of others so that they do not collectively subject him to a risk of that magnitude. Nozick has three reasons for rejecting this solution. One is that it is incompatible with *I* insofar as it permits the use of force to prohibit some people from doing actions which are not serious enough to warrant interference when considered by themselves.<sup>42</sup> Another reason is that it is incompatible with *F* insofar as it is unreasonable to believe that any person acting alone in the state

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39. *See id.* at 89-90 from which we can conclude that this is Nozick's position.

40. Nozick appears to give up *I* in just those places where he appears to give up *F*. *See id.* The weight of the evidence indicates that he accepts *I* as a constraint on solutions to the problems which are discussed in this Article.

41. *Id.* at 73-74, 89-90.

42. *Id.*

of nature is entitled to publish and enforce the laws that are needed.<sup>43</sup> The third reason is that any reasonable solution to the problem would have to appeal to "a social mechanism" which could be used to determine the relative social values of different risk-producing acts so that we can permit the more valuable ones and prohibit the others.<sup>44</sup> Nozick appears to believe that there is no principled way to make these evaluations.<sup>45</sup>

Nozick prefers to view the problem of cumulative risk as an inconvenience of remaining in the state of nature. It provides an example of an important social problem which provides people in the state of nature with a reason for establishing a central authority which is given the right, through their consent, to publish and enforce the laws which are needed to remove the inconvenience. These laws will, however, only be enforceable against those who consent to them. Those who do not consent are, in the appropriate sense, acting independently. Each of them can only be prohibited from doing risk-producing acts which are serious enough to warrant interference when considered by themselves.

We have already noted that Nozick's commitment to *F* makes him reluctant to accept law bound principles. We can now see that his commitment to *I* forces him to conclude that there are none. The proof is simple. A person who believes that there are law bound principles believes that there are some problems which are properly interpreted as problems which people are jointly responsible for solving and, therefore, that it is permissible to force people to act according to the requirements of just laws which are designed to solve those problems. Each person's act is, for the purpose of determining whether it is permissible to use force against him, evaluated on the basis of whether it is required by a just system of laws. If it is required, then it is permissible to force him to do it regardless of whether he consented to do it or whether his failure to do it is serious enough to warrant interference when considered by itself. This clearly conflicts with a commitment to *I*.

*F* and *I* are essential to Nozick's position. His commitment to *F* is, roughly speaking, a commitment to the view that all rights to use force are possessed by individuals *qua* individuals. His commitment to *I* is, roughly speaking, a commitment to the view that all rights to

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43. *Id.* at 74, 89.

44. Nozick uses the expression "social mechanism." *See id.* at 73. He expresses the view that a reasonable solution to the problem would have to appeal to a social mechanism. *See id.* at 74, 80.

45. *Id.* at 73-74, 80.

use force are possessed *against* individuals qua individuals. Together they express the individualism which is an essential part of the libertarian position.

Can Nozick offer compelling reasons for accepting *F* and *I* as constraints on how to solve the problem of cumulative risk and the more general problem of when it is permissible to prohibit nonaggressive acts? I will argue that he does not and cannot. Once we see this we will also see that he has given us no reasons for rejecting the natural position which he obviously wants to reject. In order to set the stage for my arguments, I will first have to isolate Nozick's account of our clear beliefs about which acts are aggressive and why we should accept the libertarian side constraint against aggression. It is against the background of these beliefs that the problem of when it is permissible to prohibit nonaggressive acts emerges. I will argue that Nozick's account of our clear beliefs does not force us to accept his solution to the emergent problem of when it is permissible to prohibit nonaggressive acts.

#### ASSAULT AND THE PRINCIPLE OF PRODUCTIVE EXCHANGE

Assault is a paradigm example of an act which threatens to cross the boundary defined by another's natural rights. In this section I will examine Nozick's account of why assault is forbidden. Nozick's discussion of assault arises during a discussion of the more general problem of why it is ever permissible to prohibit, rather than permit provided that compensation is paid, an act that "the agent *knows* will or might well impinge across someone's boundary."<sup>46</sup> First, he notes that we must at least prohibit the joint act of crossing another's boundary and refusing to pay compensation for the crossing.<sup>47</sup> This prohibition is necessary to assure that rights are absolute in the weak sense discussed above. Second, he notes that we must also prohibit acts in those cases where we have good reason to believe that compensation will not be paid.<sup>48</sup> These include some cases where the crossing will cause a serious irreversible injury and cases where the person who causes the injury is too poor to compensate his victim adequately. These reasons do not support a prohibition on *all* assaults. Some assaults create only a minimal risk of irreversible injury and many people who desire to assault others are in a position to compensate their victims adequately. How can we justify a prohibition on these remaining assaults?

This brings us to Nozick's third reason. He claims that to permit

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46. *Id.* at 71 (emphasis in original).

47. *Id.* at 59.

48. *Id.* at 66, 78.

assault provided that *full compensation* is paid to the victim would lead to an unfair and arbitrary distribution of the benefits of exchange.<sup>49</sup> He offers the following account of full compensation:

Something fully compensates a person for a loss if and only if it makes him no worse off than he otherwise would have been; it compensates person X for person Y's action A if X is no worse off receiving it, Y having done A, than X would have been without receiving it if Y had not done A.<sup>50</sup>

When one person assaults another, he crosses the boundary defined by the other's right to his own body. There is some highest price  $m$  which he would pay for the right to cross and there is some lowest price  $n$  which the owner of the right would accept as compensation for the crossing. Full compensation for the crossing would be  $n$ . If the two parties involved are given an opportunity to negotiate and if  $m$  is greater than  $n$ , then they will arrive at a mutually beneficial price which is between  $m$  and  $n$ . Nozick calls this price "market compensation."<sup>51</sup> He notes that to permit assaults provided only that full compensation was paid would distribute the benefits of exchange in a way which is maximally advantageous to the buyer (the assaulter). He objects that this is unfair to the seller and that it is arbitrary.

Furthermore, he believes that permitting *all* border crossings, including all assaults, provided only that full compensation is paid, would deprive everyone of the benefits of the market system of exchange. He writes:

Consider further how such a system [one that permits all border crossings provided that full compensation is paid] allocates goods. Anyone can seize a good, thereby coming to "own" it, provided he compensates its owner. If several people want a good, the first to seize it gets it, until another takes it, paying him full compensation. (Why should *this* sort of middleman receive anything?) What amount would compensate the original owner if several persons wanted a particular good? An owner who knew of this demand might well come to value his good by its market price, and so be placed on a lower indifference curve by receiving less. (Where markets exist, isn't the market price the least price a seller would accept? Would markets exist here?)<sup>52</sup>

Nozick seems to be right when he claims that a system which permitted all border crossings, including assaults, provided that full compensation

49. *Id.* at 64.

50. *Id.* at 57.

51. *Id.* at 65.

52. *Id.* at 64 (emphasis in original; footnote omitted).

was paid, would deprive everyone of the benefits of the market system as the main system for determining prices. The relevance of this claim for the problem of whether it is permissible to prohibit all assaults is not clear, however. First, we should note that a solution to the problem of whether it is permissible to prohibit assault which appeals to the consequences of adopting a general system is inconsistent with *I*. Does Nozick want to give up *I*, which he accepts as a constraint on the solution to the problem of cumulative risk, as a constraint on the solution to the problem of when it is permissible to prohibit assault? I do not believe that he does. Second, it is not clear that we must prohibit all acts which "will or might well impinge across someone's boundary," including all assaults, in order to assure ourselves of the benefits of the market system as the main system for determining prices. It will become clear that Nozick does not want to concede that we ought to permit all acts, including assaults, which do not threaten the market system.

In order to explain why Nozick does not want to give up *I*, it is useful to discuss the following example: John is at the beach with his daughter Mary. Suddenly he sees that she is drowning. The least risky way to save her is to throw her a rope. He notices that Sam, the fisherman, has a rope in his boat. He tells Sam that his daughter is drowning and that he needs the rope. Sam says that it is his rope and, therefore, that he has the right to rent it or sell it at whatever price the market will bear. He tells John he can use the rope for \$4,000. He notes that Mary's life is certainly worth more than \$4,000 to John and, therefore, that John should be grateful that he is on the scene to make this offer. John says that he has the right to take the rope provided that he pays Sam full compensation for the use of the rope and that if Sam makes any attempt to prevent him from taking it and using it he will forcefully, and rightfully, take it. I will assume that it is a fixed point of libertarian thought that Sam is right and that any use of force by John to take the rope is a violation of the libertarian side constraint that prohibits aggression.<sup>53</sup> How can Nozick explain that Sam is right?

None of the reasons which Nozick has so far offered for why we should prohibit an act, rather than permit it provided that compensation is paid, force the conclusion that Sam is right. Why is John not per-

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53. I am assuming only that a libertarian would say that Sam acts within his rights when he refuses to give John the rope and that John is not permitted to use force to take the rope from Sam after Sam has refused to give it. The libertarian need not, and almost certainly would not, say that Sam's refusal is a good act. For evidence that Nozick accepts the libertarian position, see text & notes 75-78 *infra*.

mitted to take the rope, regardless of whether Sam consents, provided he pays Sam full compensation for his use of the rope? John's use of the rope will not cause Sam to suffer an irreversible injury. Furthermore, there is little doubt that John can compensate Sam for his use of the rope. We are, after all, talking about a rope which can be bought cheaply at any fishing equipment store. Is it unfair to distribute the benefits of exchange in this case so that they are maximally beneficial to John? It may be slightly unfair for the benefits of exchange to go completely to John. Using ordinary notions of fairness, however, it would also be unfair to require John to pay market compensation to a person who is willing to exploit his misfortune.<sup>54</sup> It would appear, therefore, that the argument requiring fairly dividing the benefits of exchange does not support Sam's position. At most it requires John to pay Sam something more than full compensation for his use of Sam's rope.

We can now consider Nozick's last reason. Does permitting John to take the rope provided that he pays Sam full compensation create any threat to the market system as the principal means for determining prices? It seems clear that it does not. In fact, it seems clear that the public adoption of the following rule, which we will call "*MA*" for "Mutual Aid," will not create any threat to the market system:

*Mutual Aid:* A person is permitted to cross the boundary defined by another's rights, regardless of whether the other gives his consent, provided that: first, it is clear that his reason for crossing is to prevent a serious irreversible injury; second, he provides the person whose boundary is crossed with full compensation for any harm which results from the crossing; and third, the amount of harm which results from the crossing is negligible so that it is reasonably certain that compensation can be paid.<sup>55</sup>

If *MA* is correct, then John has a right to take Sam's rope regardless of whether Sam consents. Sam can complain only if John fails to pay him full compensation for his use of the rope. *MA* recognizes that Sam's right to his rope is absolute in the weak sense that it is never permissible to cross the boundary which it defines without compensating Sam for the crossing. It also recognizes, however, that in the cir-

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54. We are inclined to say John should not have to pay market compensation for the rope because his exchange to buy the rope would not be a voluntary exchange. We are inclined to say that it would not be a voluntary exchange because his alternative choice of increasing the likelihood that his daughter will die is unacceptable. Nozick's discussion of voluntary exchange indicates that he would call Sam's exchange to buy the rope a voluntary exchange. See R. NOZICK, *supra* note 1, at 262-64.

55. This principle is not restricted to cases where the boundary defined by a person's right to his property will be crossed. It also applies to cases where the boundary defined by his right to his labor will be crossed.

cumstances we have described John has a right, regardless of Sam's consent, to use Sam's rope. Although the initial list of natural rights does not include a right to aid, we have constructed an emergent right to aid which is consistent with the claim that natural rights are absolute in the weak sense and, therefore, with the claim that it is never permissible to use force for redistribution purposes. If Sam does not permit John to use the rope, then he is violating John's rights and is liable to compensate John for whatever harm results from the violation and to punishment for the violation. Nozick does not want these conclusions. He wants to deny that John has a natural right to use the rope and to assert that any use of force to take the rope from Sam amounts to a violation of the libertarian side constraint that prohibits aggression. How can he reach these conclusions?

Perhaps he can reach them by appealing to the root ideas of his theory. He offers the following additional reason for why we should not permit all boundary crossings even if full compensation is paid: "[A] system permitting boundary crossing, provided compensation is paid, embodies the use of persons as means; knowing that they are being so used, and that their plans and expectations are liable to being thwarted arbitrarily, is a cost to people; . . . ."<sup>56</sup> The idea that it is never permissible to use another as a means is only one of the root ideas to which Nozick appeals. I will examine each of the root ideas which appears to be relevant to the dispute between Sam and John, in order to achieve the following: first, to consider whether they force the conclusion that Sam is right; second, to establish that if they force this conclusion, then they also force the conclusion that it is permissible to prohibit assault; and finally, to show that Nozick does not need his "uncompensated for fear" argument to justify the prohibition of assault.

The root ideas which appear to be relevant to the dispute between Sam and John and to the problem of whether it is permissible to prohibit assault are the following: No person may be sacrificed for the benefit of any other person; each person must be treated as an end and never merely as a means; no person is a resource for any other person. I do not claim, nor would Nozick, that it is transparently clear what each of these means. We can, however, apply them in an intuitive way to see if they help us to resolve the dispute between Sam and John. Furthermore, we will see whether they help us to resolve the dispute between a would be assailter, whom we will call "Bob," and his intended victim, whom we will call "Jim." I will argue that to whatever extent

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56. R. NOZICK, *supra* note 1, at 71.

they provide support for Sam's position, they provide at least as much support to Jim's position. Jim's position is that it is not permissible for Bob to strike him without his consent.

Can Sam plausibly claim that he is being sacrificed to John's interests when John takes his rope, in spite of his refusal to give it up, and provides him with full compensation? How can he say that he has been sacrificed when he is left no worse off than he would have been if John had nothing at all to do with him? It seems more plausible for Jim to claim that he is being sacrificed to Bob's interests when, in spite of his refusal to permit the assault, Bob assaults him and provides him with full compensation. Even here, however, there is a puzzle. How can Jim complain that he has been sacrificed when he receives full compensation and is left no worse off than he would have been if Bob had nothing to do with him? For now, we need only note that this first root idea supports Jim's position at least as much as it supports Sam's.

Can Sam claim that John is using him merely as a means when he takes his rope in spite of his refusal to give it? Here we are inclined to turn the question back on Sam. Can John not complain that Sam's refusal to give it for anything less than \$4,000 amounts to using John's misfortune as a means to his ends? Does not the intuitive idea that it is never permissible to use another merely as a means lead us to a moral principle which says that it is not permissible to exploit another's misfortune? Jim appears to have a much sounder complaint than Sam. It would strike us as outrageous for Bob to claim that permitting Jim to hold out for market compensation, which is what we do when we prohibit assault, amounts to permitting Jim to exploit Bob's desire to assault him as a means to Jim's enrichment. Again we can confidently say that Nozick's root idea provides at least as much support for Jim's position as it does for Sam's.

Finally, can Sam claim that John is using him as a resource when he takes his rope in spite of his refusal to give John the rope? Can he complain that permitting John to take the rope amounts to making John partial owner of his body or his labor? There is something to Sam's complaint. If John has the right to take the rope provided only that he compensates Sam for the taking, then John is partial owner of Sam's labor and the fruits of his labor. This partial ownership is, however, extremely innocuous. It in no way interferes with Sam's long range planning of his life or with his chances for successfully executing his long range plan.<sup>57</sup> Whatever complaint he has would be minor

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57. Nozick suggests that we might be able to explain why it is appropriate to interpret rights as absolute side constraints by appealing to the idea of the meaningfulness

compared to the complaint that Jim would have were Bob permitted to assault him without his consent. Jim might lose his desire to plan if he knew that at any moment another might, for whatever reasons, assault him provided only that he compensated him for the harm which resulted from *that* assault. Again we can say that Nozick's root idea provides at least as much support for Jim's position as it does for Sam's. It follows, therefore, that if these root ideas force the conclusion that Sam is right, then they must also force the conclusion that Jim is right. If they force this conclusion, however, then there is no need for an additional argument to justify the prohibition on assault.

In fact, I do not believe that Nozick needs an additional argument to justify the prohibition on assault. More specifically, I believe that he can, and should, resolve the disputes between Sam and John and between Jim and Bob by appealing to a principle which I will call "the principle of productive exchange" or "PE." Furthermore, I believe that it is reasonable to view *PE* as a formal interpretation of Nozick's root ideas that each person is separate and inviolable and no person is a resource for any other person.

A productive exchange is basically an exchange in which both parties benefit. More precisely, *X* serves *Y* productively if and only if *Y* is better off as a result of his exchange with *X* than he would have been if *X* did not exist at all or had nothing to do with him.<sup>58</sup> The principle of productive exchange says that it is never permissible to use force to make a person enter a productive exchange which he has refused to enter. It presupposes that each person has a right to refuse to enter a productive exchange. This right of refusal is an expression of the fact that each person is separate and no person is a resource for any other person. Furthermore, when a person *P* acts on his right of refusal he leaves no other person worse off than he would have been in the situation in which *P* had nothing to do with him or did not exist at all. On what grounds, therefore, can any person who accepts the root idea that no person is a resource for any other person complain? Finally, the fact that no person can be forced to enter a productive exchange which he refuses to enter expresses the fact that each person is inviolable. The use of force to make a person enter a productive exchange is a paradigm case of aggression.

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of life. *See id.* at 48-51. Does John's use of force to take the rope to save his daughter amount to an admission that his life is meaningless? Would a principle like *MA*, which requires Sam to aid John, interfere with Sam's enjoyment of a meaningful life? Insofar as the answer to each of these questions is "no" it is clear that the idea of the meaningfulness of life will not lead us to the libertarian account of rights as absolute side constraints.

58. *Id.* at 84.

*PE* has straightforward implications for the disputes between Sam and John and between Jim and Bob. It should be clear that an exchange between Sam and John for permission to use Sam's rope and an exchange between Jim and Bob for permission to inflict bodily harm on Jim would both be examples of productive exchanges. Therefore, it is impermissible to force Sam to enter the exchange with John and it is impermissible to force Jim to enter the exchange with Bob. We appear committed to the view that the use of force is permissible in each case, however, when we say that John has the right to take the rope provided that he pays Sam full compensation for its use, and that Bob has the right to inflict bodily harm on Jim provided that he pays Jim full compensation for the harm he inflicts.

We can conclude that *PE* gives us the conclusions that Sam and Jim are right. Furthermore, it enables us to go straight from Nozick's root ideas to these conclusions, and it is consistent with Nozick's commitment to *I*. Therefore, we should expect Nozick to welcome it. In fact, however, he never explicitly states it. Furthermore, he appears to believe that his root ideas do not even force the conclusion that assault should be forbidden rather than permitted provided full compensation is paid. This is evidenced by his appeal to an additional argument, the "uncompensated for fear" argument, to supplement the argument from his root ideas.

Nozick asks us to imagine a general system in which all assaults are permitted provided the victims receive full compensation for the injuries which result from the assaults.<sup>59</sup> The joint act of assaulting and failing to provide compensation is prohibited. He finds it important that there are some acts which humans fear even when they are guaranteed they will be fully compensated for the injuries which those acts cause.<sup>60</sup> Assault is one of these acts. People who lived in a general system which permitted assaults would be extremely nervous and jumpy and in constant fear that they may be assaulted next. People may lose their desire to make long range plans when they know that others may assault them and interrupt those plans at any time. If a person makes plans which are frustrated by another's assault, then he receives full compensation. If he falls into apathy and gives up planning, however, there is no person who caused this and who must compensate him. Nozick's claim that a general system which prohibits assault is preferable to one which permits it provided that compensation is paid appears to be sound. The latter almost certainly leads to a tre-

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59. *Id.* at 66.

60. *Id.*

mendous amount of uncompensated for fear which does not appear in the former.

Nozick then considers a general system which permits assaults, but requires each person who assaults to compensate his victim for the injuries which the assault causes and for the fear which he suffers as a result of living in the system. Nozick offers two objections to this system. One is that it still leaves those who are not victims of assaults with uncompensated for fear.<sup>61</sup> The other is that it is not fair to make an assaulter compensate his victim for the fear caused by the system and not by his particular act.<sup>62</sup> Nozick is appealing to a variation of *I*. The assaulter's act did, when it is considered by itself, amount to a violation of another's right. Therefore, it is permissible to use force to make him compensate his victim for the injuries his act caused. We cannot, however, make him pay for injuries which his act, considered by itself, did not cause. Nozick concludes that the system which prohibits assault is preferable to this system.

Nozick then turns to a system which permits assault provided only that those who assault immediately compensate their victims and bribe them to keep quiet.<sup>63</sup> It might appear that in this system, since people would not be aware of how many assaults were taking place, there would be no problem of uncompensated for fear. Nozick realizes, however, that appearances are deceptive:

The difficulty is that the knowledge that one is living under a system permitting this, itself produce apprehension. How can anyone estimate the statistical chances of something's happening to him when all reports of it are squelched? Thus even in this highly artificial case it is not merely the victim who is injured by its happening in a system that is known to allow it to happen. The widespread fear makes the actual occurrence and countenancing of these acts not merely a private matter between the injurer and the injured party.<sup>64</sup>

Nozick concludes that such a system, which also creates a significant amount of uncompensated for fear, is less desirable than the system which prohibits assault.

Nozick examines one final system. It is a system which prohibits assault, but permits any individual to opt out by making a public announcement that "he would do a certain act at will, and not only would he compensate all his victims, if any, but he would also compensate ev-

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61. *Id.* at 67.

62. *Id.* at 66.

63. *Id.* at 67.

64. *Id.*

eryone who felt fear as a result of his announcement, even though he hadn't actually done the act to them."<sup>65</sup> Nozick notes that the amount of compensation which would be required would be so great as to be beyond the means of almost everyone.<sup>66</sup> However, this is a practical consideration. It leaves open the possibility that some very rich person would be permitted to assault others if he paid them full compensation. In addition to this practical consideration, Nozick offers two arguments against this system which permits opting out:

First, persons might have free-floating anxiety about attack, not because they had heard some particular announcement, but because they know the system permits these attacks after announcement, and so worry that they have *not* heard some. They cannot be compensated for any they have not heard of, and they will not file for compensation for the fear these caused. . . . No particular announcement caused such fear without a specific announcement as its object, so who should compensate for it? Thus our argument is repeated one level up; but it must be admitted that at this level the fears *may* be so attenuated and insubstantial as to be insufficient to justify prohibiting *such* announcements. Secondly, in line with our earlier discussion of fair exchange prices, one might require someone who makes such an announcement to make not merely full but market compensation. . . . Since fear looks very different in hindsight than it does while being undergone or anticipated, in these cases it will be almost impossible to determine accurately what is the amount of market compensation, except by actually going through the negotiations.<sup>67</sup>

The first argument notes that a public understanding that people are, under the specified conditions, permitted to opt out of the prohibition on assault will cause some people to suffer fear for which they will not be compensated. Nozick concedes, however, that this fear may be insufficient to justify prohibiting a person from opting out when he is willing to pay for the fear which *his* opting out causes. We are, therefore, still without an argument for why a very rich person is not, in principle, permitted to opt out of the prohibition on assault.

This brings us to Nozick's second argument which in turn brings us back to his discussion of fair exchange prices.<sup>68</sup> There are two interpretations of his earlier discussion of fair exchange prices. Each assumes that in cases of productive exchange it is unfair for the benefits of exchange to go completely to the buyer. According to the weaker

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65. *Id.* at 68.

66. *Id.*

67. *Id.* (emphasis in original).

68. See text & notes 49-54 *supra*.

interpretation there is, in principle, no objection to forcing a person to enter a productive exchange provided that he is paid fair compensation, which will be more than full compensation, for the crossing of his boundary. According to this interpretation we cannot go straight from the fact that full compensation for the crossing is unfair to the conclusion that we must rely on the market (i.e., voluntary exchange) to determine what is fair. So, for instance, a person who adopts this interpretation has no principled objection to the position that Sam must give John the rope provided that John pays him fair compensation for his use of the rope. He also has no principled objection to the position that a person is permitted to opt out of the prohibition on assault provided that he pays fair compensation to those he assaults. He can only object to permitting a person to opt out on the practical ground that there is no reasonable way to determine what constitutes fair compensation. I cannot believe that Nozick wants to say that there is no principled reason for prohibiting a person from opting out of the system which prohibits assault.

According to the stronger interpretation, there is a principled reason for objecting to permitting a person to opt out of the prohibition on assault. The stronger interpretation gives up the search for the fair price and simply asserts that the just price is the price, if any, upon which people voluntarily agree. It accepts *PE* as an interpretation of the root ideas that each person is separate, inviolable, and not a resource for any other person. Permitting a person to opt out of the prohibition on assault without the consent of his possible victims is inconsistent with *PE* and, therefore, is forbidden. A person who accepts *PE* can explain why assault is forbidden directly. He does not have to appeal to the bad consequences which would result from adopting the alternative policy of permitting assault provided that fair compensation was paid. There are two reasons why Nozick should avoid attempting to justify the prohibition on assault by appealing to the bad consequences associated with adopting an alternative policy. One is that this justification is inconsistent with *I*. When we decide whether to prohibit a particular assault we do not examine the act as an isolated act but, instead, examine it as part of a general system. The other is that his justification of the prohibition on assault will not lead to a parallel justification of Sam's position in his dispute with John. It will not justify the position that John is forbidden to take Sam's rope when Sam has refused to let him use it. Nozick can get the conclusion that Sam is right by appealing to *PE*. He cannot get it by appealing to the uncompensated fear, or other bad consequences, people would suffer in a sys-

tem in which people publicly accept *MA*. I will now explain why this is so.

Let me retrace some of my steps. First, I argued that if the root ideas of Nozick's theory force the conclusion that Sam is right, they also force the conclusion that Jim is right. Equivalently, if they do not force the conclusion that Jim is right, then they do not force the conclusion that Sam is right. Second, I argued that it is reasonable to view *PE* as a formal interpretation of some of the root ideas of Nozick's theory and that by doing this Nozick can reach the conclusions that Sam and Jim are right without giving up *I*. Third, I noted that Nozick appears to reject *PE*. This follows from his apparent belief that the root ideas do not force the conclusion that Jim is right, which in turn follows from his apparent belief that he needs an additional argument—the argument based upon uncompensated for fear—to establish that Jim is right. But if an additional argument is needed to establish that Jim is right, then an additional argument is also needed to establish that Sam is right. I am going to consider whether the argument from uncompensated for fear, which Nozick uses to support Jim's position, will provide any support for Sam's position. I will do this by examining the consequences of the public acceptance of *MA*. Sam's position is right only if *MA* is wrong. We have already noted that the public acceptance of *MA* will not threaten the market system as the principal system for determining prices. We will now consider whether its public acceptance will lead to uncompensated for fear. If the answer is "no," then Nozick will not, unless he accepts the principle of productive exchange, have any argument for Sam's position. This will be extremely embarrassing, since Sam's position is the libertarian position.

Can Sam argue against *MA* on the ground that its public acceptance will lead to a substantial amount of uncompensated for fear? In order to answer this question, we must compare *MA* with another system which supports Sam's position. We will call this other system "*IA*" for "individualist anarchist." It is the system which will be acceptable to a person who accepts *PE*. It says:

*Individualist Anarchist:* A person *A* is never permitted to cross the boundary defined by another person *B*'s natural rights when *B* explicitly refuses to give his consent, and *B*'s refusal does not make any other person worse off than he would have been in the situation in which *B* did not exist at all or had nothing to do with *A*.

It seems clear that the public acceptance of *MA* will not lead to any significant amount of uncompensated for fear. This would appear to be Nozick's own position. While discussing the uncompensated for fear

a person would suffer in a system which permitted assault, he writes:

Not every kind of border crossing creates such fear. If told that my automobile may be taken during the next month, and I will be compensated fully afterwards for the taking and for any inconvenience being without the car causes me, I do not spend the month nervous, apprehensive, and fearful.<sup>69</sup>

If we further know that our automobile may only be taken in cases where it is needed to prevent a serious irreversible injury to somebody else, we will probably not suffer any fear at all.

If Nozick's position is that we cannot choose between *MA* and *IA* by appealing to either the root ideas of his theory or to the argument from uncompensated fear, then how can we choose between them? It would appear that what we must do is examine the other advantages of each. But when we do this *MA* is clearly preferable. Its public acceptance has two very valuable consequences: First, it increases each person's security by lowering the possibility that he will find himself in a situation in which he will suffer a serious irreversible injury; second, it leads to a common understanding that each person in the society must show a minimal concern for every other person's well being. Does *MA* have any disadvantages when compared to *IA*? It has the minimal disadvantage that it might sometimes commit you to aiding a person whom you would rather see suffer. It also has the minimal disadvantage that the person whom you must aid may not be able to pay the compensation to which you are entitled for your aid. These are small prices to pay to increase the likelihood that you will not be a victim of a serious irreversible injury. It would appear that *MA* is clearly preferable to *IA* and, therefore, that John has a right to use Sam's rope provided he pays Sam full compensation for his use.

Can Sam save his position by saying that we are only supposed to examine the consequences of adopting competing public rules *for the purpose of establishing a presumption in favor of one?* Once we have established a presumption, we are then supposed to ask whether it is permissible to prohibit a person from opting out of its scheme of rights and duties. This appears to be the approach Nozick took in his discussion of assault. Initially, he compared the consequences of adopting the public rule which prohibits assault with the consequences of adopting the public rule which permits assault provided compensation is paid. He did not, however, consider the issue settled with the conclusion that the system which prohibits is preferable. He went on to consider a system which permitted any person to opt out of the pro-

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69. R. NOZICK, *supra* note 1, at 66-67.

hibition on assault provided he compensated all those who suffered injuries as a result of his assaults and all those who suffered as a result of his announcement that he would opt out.

Will this approach help Sam? There appear to be good reasons for prohibiting Sam from making and acting on the following announcement: Nobody is permitted to cross the boundary defined by my rights without my explicit consent. It does not matter that a consequence of my refusal is that some people will suffer serious irreversible injuries. Nor does it matter if the people who want to cross recognize a duty to pay me full compensation for whatever harm I suffer as a result of their crossings. To show my good faith in this matter, I explicitly give up my right, as defined by *MA*, to cross another's boundary to prevent a serious irreversible injury to myself.

The presumption establishes that *MA* is the benchmark since it is the optimal system. But if we consider *MA* to be the benchmark, it is clear that a person who makes the above announcement makes others worse off. He may even cause others to suffer uncompensated for fear. This is because people may suffer fear when they realize that their chances of suffering serious irreversible injuries have increased. Should we make him compensate every person who suffers this fear? Even if we make him compensate those who suffer fear as a result of his announcement, there is still the problem of those who suffer fear because they know they live in a system which permits such announcements and can never be sure that they have heard each one. Who will compensate them? Once we accept *MA* as the benchmark, there appear to be compelling reasons for prohibiting people from opting out of its requirements.

Nozick might attempt to distinguish the problem of permitting people to opt out of *MA* from the problem of permitting people to opt out of compliance with the public rule which prohibits assault, by saying: "Note that not every act that produces lower utility for others generally may be forbidden; it must cross the boundary of others' rights for the question of its prohibition even to arise."<sup>70</sup> He might want to say that a person who opts out of *MA* does not threaten to cross the boundary defined by another's rights while the person who opts out of the prohibition on assault does. Similarly, he might want to say that the fear created by a person who opts out of *MA* is not associated with an increased likelihood that some person's boundary will be crossed while the fear created by a person who opts out of the prohibition on

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70. *Id.* at 67 n.

assault is associated with an increased likelihood that some person's boundary will be crossed. This attempt at distinguishing the cases will only work, however, if Nozick has already established that *MA* is unacceptable. This is because it presupposes, contrary to what *MA* claims, that people do not have a right to aid.

Nozick can, of course, go straight to the argument that we must permit the person to opt out of *MA* since his opting out does not leave any other person worse off than he would have been in the situation in which the person who opted out did not exist at all or had nothing to do with him. There are two things to note about this argument. First, it is not outrageous to claim that a person is better off living in a society in which all *n* members accept *MA* than living in a society of *n*+1 members in which only *n* members accept *MA*.<sup>71</sup> Second, to invoke the argument is to concede that *PE* is acceptable. To concede this, however, is to concede that the argument from uncompensated for fear is not necessary to reach the conclusions that Jim and Sam are right. I have been arguing that Nozick should, on reflection, be willing to make this concession.

Where did Nozick go wrong? He appears to have some second thoughts about the argument regarding uncompensated for fear. He writes:

Is our argument too utilitarian? If fear isn't produced by a particular person, how does it justify prohibiting him from doing an action provided he pays compensation? Our argument goes against the natural assumption that only the effects and consequences of an action are relevant to deciding whether it may be prohibited. It focuses also on the effects and consequences of its not being prohibited. Once stated, it is obvious that this must be done, but it would be worthwhile to investigate how far-reaching and significant are the implications of this divergence from the natural assumption.<sup>72</sup>

The argument is too utilitarian if it turns out to be incompatible with *I*. *I* requires that we view each problem of when it is permissible for one person to use force against another as a problem between two persons acting alone in the state of nature. To the extent that the argument from uncompensated for fear looks at the consequences of adopting different public rules it certainly appears to be incompatible with *I*. It

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71. Here I take issue with a position Nozick defends. *See id.* at 174. It seems to me perfectly plausible to claim that fraternal feelings will develop among people who live within a system in which each is required to show some concern for the well-being of the rest. This is, however, clearly an empirical issue.

72. *Id.* at 69.

does not base the conclusion that Bob is forbidden to assault Jim on the fact that permitting Bob to assault Jim would cause Jim uncompensated for fear. The fear it causes Jim can, in principle, be handled by charging Bob. Instead, it bases its conclusion on the fact that the public rule which permits assault leads to fear which cannot, in principle, be handled by charging Bob. This is because Bob did not cause this fear and, therefore, he cannot be held liable to pay for it.

What happens when we consider the problem of assault as a problem between two persons acting alone in the state of nature? We must answer the following question: Is it permissible for *A*, when he considers *B*'s actions independently of the actions of other people who are acting independently of *B*, to prohibit *B* from assaulting him? If the answer to this question is "yes," then Nozick can claim that any person acting alone in the state of nature is permitted to publish and enforce a rule which prohibits any assault which does not receive the prior consent of its victim. However, this is not because the alternative public rule—the one which permits assaults provided compensation is paid—will lead to uncompensated for fear. Instead, it is because Nozick adopts the view that if it is permissible for one person acting alone in the state of nature to punish a person for doing an act, then it is permissible for any person acting alone in the state of nature to punish that person.<sup>73</sup>

Is the argument regarding uncompensated for fear necessary to explain why *A* is permitted to prohibit *B* from assaulting him? Let us consider a case where *B* approaches *A* and announces that he will assault *A* at will and provide him with full compensation for the injuries which result from each assault. *A* will almost certainly insist that full compensation for the injuries which result from each assault does *not* amount to full compensation because it does not cover compensation for the fear which *A* will suffer knowing that his plans might be interrupted at any time. He might go on to say that once we take account of this fear it is clear that *B* is in no position to pay the amount of compensation which *A* is entitled to. This will be true even if *B* promises, and *A* believes that his promise is sincere, that *B* will never impose a serious irreversible injury such as death on *A*. It would appear, therefore, that considerations of uncompensated for fear turn the case of assault into a case where it is permissible to prohibit a border crossing because the person who wants to cross is not in a position to compensate his victim. Does this show that considerations of uncompen-

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73. *Id.* at 137.

sated for fear are necessary to justify the prohibition on assault? I do not believe that it does.

Let us change the case so that *A* and *B* have never met and, therefore, have never discussed the question of people's rights in assault situations. Let us further assume that *B* simply approaches *A* in his sleep and pummels him. The next morning he offers to pay *A* full compensation. He explains that he always wanted to pummel a defenseless person and could not resist the golden opportunity he had the previous night. His offer of compensation is high and his promise to never again assault *A* is unquestionably sincere. Is *A* permitted to punish *B* for his assault? I am certain that Nozick would say that he is. Whatever reasons he gives cannot, however, be reasons which appeal to the uncompensated for fear which *A* suffered. *A* suffered a terrible beating, but he did not suffer any fear prior to *B*'s attack and does not suffer any fear that *B* will attack him again. *B* is, after all, an honest person who reported his attack and offered to pay compensation.

Perhaps Nozick wants to say that *A* must be entitled to punish *B* so he can warn others that they are not permitted to assault him without his consent. Unless he makes an example of *B*, he will be less certain that others will refrain from assaulting him and, therefore, will suffer uncompensated for fear. To say this, however, is to give up *I*. It is to make a decision about when it is permissible to use force against *B* by appealing to information about how other people, acting independently of *B*, will act.<sup>74</sup>

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74. It is of some interest to note that Nozick's initial discussion of punishment, where he compares retributive and utilitarian theories of punishment, assumes there is a uniform system of punishment. *See id.* at 59-62. It assumes that there is a central authority which prohibits certain acts and which must adopt a uniform policy concerning which punishments are appropriate for which acts. Nozick argues that the principles which apply to the evaluation of these policies are basically retributive rather than utilitarian. He argues that there is an upper limit on the amount of punishment appropriate for each act and that it is not permissible to surpass that limit even when it will lead to greater deterrence. This is compatible with *I*. He does not, however, go on to accept a principle of comparative justice which says that those who deserve the same amount of punishment ought to receive the same amount of punishment. Principles of comparative justice are incompatible with *I*.

Nozick asserts that any person acting alone in the state of nature is entitled to punish any violation of the law of nature. This immediately leads him to the problem of who is entitled to punish in cases where more than one person wants to exercise his right to punish. He rejects the solution that the right to punish is a right held jointly by all people and, therefore, creates the need for special procedures to determine which person should be specially empowered to punish. His reasons are that it would be the only right which is held jointly by people and that there is no institutional apparatus already existing in the state of nature which people can use to determine which person should be specially empowered. These reasons are not very convincing. They become less convincing when we examine Nozick's own solution to the problem:

*To the extent* that it is plausible that all who have some claim to a right to punish have to act jointly, then the dominant agency will be viewed as having the greatest entitlement to exact punishment, since almost all authorize it to act in their place. In exacting punishment it displaces and preempts the actions to punish of the fewest others.

Finally, we should note that it will not do for Nozick to say that uncompensated for fear enters the picture because other people will want to punish *B* to provide themselves with protection from actions like *B*'s. Other people have the right to punish *B* if and only if *A* has the right. Once we determine that *A* has the right, there is an easy explanation for why other people have an interest in seeing that *B* is punished. We can understand why others might choose to punish *B* even if *A* chooses to forgive him. It is because they want some assurance that *B* and others like him will not satisfy their one-time desire to pummel a defenseless person. These considerations only enter, however, after we have determined that *A* has the right to punish *B*. We can make this point more forcefully by going back to the dispute between Sam and John. If Sam has the right to punish John, then any person acting alone in the state of nature has the right to punish him. Others may not, however, have any desire to exercise this right since John's act is not considered threatening to them. They are, after all, good people who permit others to use their property in cases where it is needed to prevent a serious injury and they are guaranteed full compensation for its use. They may even believe that Sam's refusal to give John the rope was such a heinous act that they will boycott his business should he dare to punish John. These considerations should make it clear that it is one thing to ask whether people have the right to punish and another to ask whether they have compelling reasons for exercising that right. Consideration of uncompensated for fear will help Nozick explain why people exercise that right, but will not help him explain why they have that right.

I have suggested that Nozick wants to justify the conclusion that Jim and Sam are right and I have argued that he can reach both conclusions without giving up *I*, by appealing to *PE*. I have also shown that Nozick's appeal to the argument concerning uncompensated for fear suggests that he rejects *I*, *PE*, and the conclusion that Sam is right. What is Nozick's position? I have already given evidence that he accepts *I*.<sup>75</sup> Now I will give evidence that he accepts *PE* and the conclusion that Sam is right. The availability of this evidence makes me more comfortable in attributing these positions to him and in concluding that

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*Id.* at 139-40 (emphasis in original). Does this imply that a representative of the People's Republic of China is entitled to punish any violation of the law of nature which occurs in the United States since he represents more people than the representative of the United States does? Nozick must, I believe, either give up his belief that any person has the right to punish any violation of the law of nature or his solution to the problem of how to resolve conflicts when more than one person wants to exercise his right to punishment.

75. See text & notes 39-45 *supra*.

his appeal to the argument about uncompensated for fear was simply a mistake.

More specifically, we will see that he accepts the following, stronger version of *PE*:

No person is permitted to use force to make a person enter a productive exchange he has refused to enter. Furthermore, a person must always, in cases where an exchange to buy the right to cross another's boundary would be a productive exchange, attempt to obtain the consent of the person whose boundary he desires to cross, unless it will be impossible, or very costly, to locate the person in order to determine whether he will give his consent. A person who fails to make this attempt and crosses without obtaining the other's consent is liable to punishment.

The following passage provides evidence that Nozick accepts this principle: "Any border-crossing act which permissibly may be done provided compensation is paid afterwards will be one to which prior consent is *impossible or very costly* to negotiate (which includes, ignoring some complications, accidental acts, unintentional acts, acts done by mistake, and so on). But not vice versa."<sup>76</sup> One might object that this does not commit him to *PE* and to the conclusion that Sam is right because one of the costs John faces in negotiating with Sam is the increased likelihood that his daughter will drown. It seems clear, however, that Nozick would not count this as a relevant cost. Consider the following discussion of when the costs of negotiation are too great:

Shouldn't those who have not gotten their victims' prior consent (usually by purchase) be punished? The complication is that some factor may prevent obtaining this prior consent or make it impossible to do so. (Some factor other than the victim's refusing to agree.) It might be known who the victim will be, and exactly what will happen to him, but it might be temporarily impossible to communicate with him. Or it might be known that some person or other will be the victim of an act, but it might be impossible to find out which person. In each of these cases, no agreement gaining the victim's permission to do the act can be negotiated in advance. In some other cases it might be very costly, though not impossible, to negotiate an agreement. The known victim *can* be communicated with, but only by first performing a brain operation on him, or finding him in an African jungle, or getting him to cut short his six-month sojourn in a monastery where he has taken a vow of silence and abstinence from business affairs, and so on; all very costly.<sup>77</sup>

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76. R. Nozick, *supra* note 1, at 72 (emphasis added).

77. *Id.* at 71-72 (emphasis in original).

The reasons Nozick gives for concluding it would be too costly to negotiate an agreement are quite different from the reason available to John. Furthermore, Nozick explicitly says that the reason must be "some factor other than the victim's refusing to agree." It is now beginning to appear that Nozick accepts *PE* and that Sam is right.

For those who are still skeptical, we can refer to Nozick's discussion of the general question whether a person is morally bound to give up what he has legitimately acquired to prevent serious harm to another.

The fact that someone owns the total supply of something necessary for others to stay alive does *not* entail that his (or anyone's) appropriation of anything left some people (immediately or later) in a situation worse than the baseline one. A medical researcher who synthesizes a new substance that effectively treats a certain disease and who refuses to sell except on his terms does not worsen the situation of others by depriving them of whatever he has appropriated.<sup>78</sup>

The medical researcher has the right to sell on his own terms. If you cannot meet his terms, then you must accept the consequences. In this case, people must suffer the consequences of having a certain disease. Similarly, Sam has the right to sell on his own terms. If John cannot meet his terms, then Jim must suffer the consequences—in this case the death of his daughter. Nozick seems to believe that the principle of productive exchange is acceptable and that Sam is right.

The modified version of *PE* I have attributed to Nozick applies to the problem of when it is permissible for one person to use force to interfere with another's doing an act only when we make the following focusing assumptions: The act is certain, or reasonably certain, to cross the boundary defined by another's natural rights; the exchange to buy the right to do the act would be a productive exchange; and, it is neither impossible nor very costly to determine whether the person whose boundaries are threatened by the act will give his consent to the performance of the act. Nozick's commitment to the principle of productive exchange is a commitment to the following beliefs: First, that it is wrong for the person to do the act without the consent of the person whose boundary is threatened; second, that it is permissible for the person whose boundary is threatened to use force to prevent the performance of the act;<sup>79</sup> and third, that the use of force to do the act

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78. *Id.* at 181. See also *id.* at 179 n. (discussion of the right to life); *id.* at 238 (discussion of rights).

79. Nozick discusses the problem of how we determine how much harm can be inflicted on an aggressor to prevent his aggressive act. See *id.* at 62-63. He acknowl-

is a paradigm case of aggression. Furthermore, I believe that it is best to interpret Nozick as believing that the principle of productive exchange follows directly from his root ideas that each person is separate and inviolable and no person is a resource for any other person. There still remains, however, the question of how we are to solve the problems which emerge when we drop one or more of the focusing assumptions noted above.

In the remainder of this section I will be interested in cases where an act is certain to cross the boundary defined by another's rights, where an exchange to buy the right to do the act would be a productive exchange, but where it is impossible or very costly to locate the person whose boundary is threatened. A case which might fall into this category, which is not as bizarre as the cases Nozick offers, is the following: John is in the same predicament as before. This time, however, Sam is not in sight. If John attempts to find Sam it is certain that his daughter will drown. He takes the rope and saves her. He locates Sam later that day and offers to pay him full compensation for the use of the rope. Is Sam permitted to punish John? I believe that Nozick would say "no." It would simply be too counterintuitive, especially when we recall Nozick's belief that if Sam is permitted to punish John, then any person is permitted to punish him, to claim that Sam is permitted to punish John. Does Nozick want to say that any sadist or any enemy of John can use his commendable act as an opportunity to injure John?<sup>80</sup> Since Nozick rejects the view that the right to punish and the right to grant mercy reside solely in the victim, he would have to say that they do.<sup>81</sup>

If Sam is extremely concerned about others using his property without his consent, he can put a large sign on his boat which reads: "NO PERSON IS PERMITTED TO USE THE CONTENTS OF THIS

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edges that the amount needed to prevent an aggressive act is sometimes more than the amount permitted and, therefore, there is sometimes a duty to retreat. The amount of harm Sam is permitted to inflict on John to prevent him from taking the rope may be low. However, Sam still has the right to punish John for his aggressive act.

80. Nozick worries about the problems caused by sadists. *See id.* at 138. There is, however, a more pressing reason why he should want to avoid the conclusion that any person acting alone in the state of nature is entitled to punish John. It is his commitment to the view that "a person's ill-gotten gains are to be removed or counterbalanced, if any remain after he has compensated his victims, apart from the process of punishment." *Id.* at 69. If Nozick considers John's act of taking the rope to be a punishable act then he must, to remain consistent, also believe that it is permissible to remove John's ill-gotten gain. In this case, his ill-gotten gain is his daughter's life. How is that supposed to be removed? It seems clear that Nozick must change his view about how to interpret the maxim that no person shall profit from his own wrong. *See id.* at 60, 69. It is simply too counterintuitive to hold, as Nozick appears to hold, that a person should be subjected to especially hard treatment when he violates another's rights for the purpose of providing a great benefit to a third party.

81. *Id.* at 138-39. Nozick does not explicitly deny that the victim has the sole right to grant mercy, but what he says certainly suggests he would deny it.

BOAT WITHOUT THE EXPLICIT CONSENT OF SAM." This sign defeats the presumption that any person is entitled to use another's property provided that he compensates the other for its use, in cases where consent is very difficult to obtain. In the absence of the sign a person is permitted to use another's property when the other's consent is difficult to obtain. He is liable to punishment, however, should he use the property and attempt to avoid paying compensation.

My conclusion is that Nozick must accept a distinction between acts which are forbidden and punishable even though those who are liable to punishment for doing them were never warned they would be punished for doing them and acts which are forbidden and punishable only when those liable to punishment were warned that they would be punished for doing them. Assault would fall into the first category, while John's act of taking the rope when Sam was nowhere near his boat would fall into the second. The boundaries of this distinction may not always be clear. Those who are bothered by the vagueness of this distinction can remove it by simply affixing signs to their property specifying exactly when others can use it without their explicit consent.

It may appear to the reader that I am misrepresenting Nozick's position. I appear to be saying that any person is, provided he puts a warning on each piece of his property, permitted to punish any person who uses his property without his consent. Therefore, I appear to be committing him to the view, which he explicitly rejects, that it is always permissible to prohibit. He tells us that we must sometimes permit acts which threaten to cross our boundaries when the following conditions are satisfied:<sup>82</sup> First, where it will be impossible or very costly to find the person whose boundary will be crossed to determine whether he will give his consent; second, the case is one in which the benefits of permitting the crossing far outweigh, either in terms of harm prevented or good produced, the costs of providing full compensation to those whose boundaries are crossed; third, where permitting the actions will not lead to uncompensated for fear; fourth, where the compensation to those whose boundaries are crossed is more than full compensation. In order to see that the position I have committed Nozick to is consistent with his belief that it is not always permissible to prohibit, we must recall the focusing assumptions. I am only committing Nozick to the view that it is always permissible to prohibit, by the method of affixing signs to one's property, in cases where an act is certain to cross the boundary defined by another's rights and the exchange to buy the right to do the act would be a productive exchange.

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82. *Id.* at 72-73.

Finally, we should note that people may find their natural entitlements to be inconvenient. If they do, they can use their natural right of contract to remove the inconvenience. So, for instance, they may voluntarily join a mutual aid society in which all accept the duties imposed by *MA* or by some similar principle. The mutual aid society will provide its members with added security and a sense of community they did not have when they governed their relations according to the principle of productive exchange. Members of the society may not, however, impose its requirements on those who are not members. They may sometimes provide nonmembers with the benefits to which members are entitled in order to show them the benefits of membership. The provision of these benefits does not, however, give them the right to impose the duties of membership on others. The natural entitlements of those who do not join must be respected.

#### UNPRODUCTIVE EXCHANGES AND BLACKMAIL

In our discussion of the disputes between Sam and John and Jim and Bob, we considered two possible assignments of entitlements:

1. The person whose boundary is threatened by the performance of *A* has the right to prohibit the performance of *A*. If a person wants to perform *A* he must pay market compensation for the consent of the person whose boundary is threatened;
2. A person who wants to perform *A* has the right to perform *A* provided he pays the other full compensation for the harm *A* causes the other. If the other wants to be free from the consequences of *A*, even though he is guaranteed full compensation should *A* be performed, he must pay market compensation for this freedom.

Nozick's commitment to *PE* commits him to the entitlements described in the first assignment. We should note, however, that either assignment of entitlements in the disputes between Sam and John and between Jim and Bob would satisfy the following condition: No person can complain, when the other acts within his rights, that he is made worse off than he would have been if the other did not exist at all or had nothing to do with him. This shows that *PE* is an extremely powerful principle. It implies that it is never permissible to force a person to enter a productive exchange *even when he is guaranteed more than full compensation for entering the exchange*.

*PE* only applies, however, in cases where an exchange to buy the right to do *A* would be a productive exchange. There are two other cases which will be of interest to us. One is the case where either assignment of entitlements sketched above will leave at least one party with the complaint that he is worse off than he would have been in

the situation in which the other did not exist at all. We will see in a subsequent section of this Article that the problem of what people's entitlements are in risk-producing situations is a difficult one for Nozick precisely because each of the natural assignments leaves at least one person worse off than he would have been if the other did not exist at all. Now, however, we will turn to the other case where one assignment of entitlements leaves one person with the complaint that he is worse off than he would have been in the situation in which the other did not exist at all, while the other assignment leaves no person with this complaint. Should we not adopt the assignment which leaves no person with this complaint? This brings us to Nozick's discussion of blackmail.

Nozick would say that *A* blackmails *B* when *A* offers to withhold information *B* wants withheld, and *A*'s sole motive for revealing the information is to get *B* to pay him not to reveal it.<sup>83</sup> If *A* is permitted to blackmail *B*, *B* can complain that he would have been better off if *A* did not exist at all or had nothing to do with him.<sup>84</sup> If, however, we permit *B* to prohibit *A* from revealing the information, *A* has no complaint. He is not made worse off than he would have been in the situation in which *B* did not exist at all or had nothing to do with him because his sole motive for revealing the information is, by hypothesis, to get *B* to pay him not to reveal it. It would appear, therefore, that we ought to permit *B* to prohibit *A* from revealing the information. There is one problem with this. *A*'s act of revealing the information does not threaten to cross the boundary defined by any one of *B*'s natural rights.<sup>85</sup> Nozick thus can claim that it is permissible to prohibit blackmail only if he is willing to give up his earlier claim: "Note that not every act which produces lower utility for others generally may be forbidden; it must cross the boundary of others' rights for the question of its prohibition even to arise."<sup>86</sup> It appears that Nozick is willing to retreat from his earlier position to the position that in *special* cases it is permissible to prohibit a person from doing an act which does not threaten to cross the boundary defined by another's rights:

Our earlier discussion of dividing the benefits of voluntary exchange, thus, should be narrowed so as to apply only to those ex-

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83. *Id.* at 84-85.

84. Nozick asks us to ignore the following types of complications: that *A* might be a person whose existence benefited *B* over the long run but not in this particular case; and that *A* might be withholding information which he stumbled upon and might be charging less to withhold it than the next person who would have stumbled upon it would have charged. *Id.* at 85 n. Since Nozick ignores these complications, so will we.

85. See text accompanying notes 6-11 *supra*.

86. R. NOZICK, *supra* note 1, at 67 n.

changes where both parties do benefit in the sense of being the recipients of productive activities. Where one of the parties does not so benefit and is unproductively "served," it is fair that he merely barely compensates the other, *if* any compensation is due the other party at all.<sup>87</sup>

When *B* prohibits *A* from revealing the information, an act which does not threaten to cross *B*'s boundary, *B* crosses *A*'s boundary. In this case, unlike cases of productive exchange, *B* is permitted to cross, regardless of whether *A* consents, provided he compensates *A* for the crossing. It is the blackmailer's borders which are crossed and, therefore, it is the blackmailer who is entitled to compensation.

In order to state the principle Nozick apparently appeals to we must explain when one person serves another unproductively: *X serves Y unproductively* when *Y* is not better off as a result of his voluntary exchange with *X* than he would have been in the situation in which *X* did not exist at all or had nothing to do with him; the exchange is one in which *Y* buys *X*'s abstention from doing an act; and *X*'s sole motive for doing the act is to get *Y* to pay him not to do it.<sup>88</sup> The blackmailer serves his client unproductively, and those who operate a protection racket serve their clients unproductively. Nozick can explain why it is permissible to prohibit a person from operating a protection racket by appealing to *PE*. The acts he threatens to do are acts others can prohibit by appealing to *PE* and, therefore, are acts he has no right to do. When others prohibit him from doing them they do not have to pay him compensation, since they have not crossed his boundary. In order to explain why it is permissible to prohibit blackmail, however, Nozick must appeal to a new principle which we will call "the principle of unproductive exchange" or "*UP*," which states:

*The Principle of Unproductive Exchange:* It is permissible for *Y* to prohibit *X* from doing *A* provided *X* is *properly* compensated when *X*'s doing *A* does not threaten to cross *Y*'s boundary but *Y* would be served unproductively in an exchange in which he pays *X* not to do *A*.

It should be obvious to the reader that *UP* is compatible with *I*. It should also be clear that *UP* must be supplemented by an account of what counts as proper compensation. Nozick believes that in some cases full compensation is required while in others no compensation is required.

We have noted that one reason why Nozick's position on blackmail

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87. *Id.* at 86 (emphasis in original).

88. For a list of the complications which Nozick ignores, and which we will also ignore, see discussion note 84 *supra*.

is problematic is its apparent inconsistency with his earlier claim that the question of prohibition only arises in cases where an act threatens to cross another's boundary. Nozick makes his position consistent by dropping the earlier claim and appealing to *UP*. There are, however, other problems with his position.

Before we examine whether *UP* is a reasonable principle we should note that Nozick appears to believe that it is sometimes permissible to prohibit a person from revealing information in cases where *UP* will not justify a prohibition.

[S]omeone writing a book, whose research comes across information about another person which would help sales if included in the book, may charge another who desires that this information be kept secret (including the person who is the subject of the information) for refraining from including the information in the book. He may charge an amount of money equal to his expected difference in royalties between the book containing this information and the book without it; he may not charge the best price he could get from the purchaser of his silence.<sup>89</sup>

As Nozick describes the case, it is not true that the person's motive in publishing the new information is to get the other to pay him not to do it. An exchange to pay him not to publish could not, therefore, be an unproductive exchange. Nozick appears to believe, however, that it is permissible to prohibit him from publishing the information provided he is paid full compensation for the losses he suffers as a result of withholding the information. The apparent difference between this case and one where a person's sole motive in revealing information is to sell his silence is the amount of compensation that is appropriate.

Does Nozick really want to claim that any person is permitted to prohibit any other person from publishing information, no matter what this person's reasons for publishing the information are, provided he fully compensates the other for the harm he suffers as a result of the prohibition? Let us assume that the author in Nozick's example came across information that a famous corporation president reached the presidency by blackmailing others and masterminding a great fraud which catapulted the corporation to its commanding market position. Is Nozick's position that this wealthy person should be permitted to approach the author and say: "I prohibit you from publishing that information. Here is an amount of money which will more than compensate you for what you will lose by not publishing it?" It is outrageous to say that the writer must accept the money and shut up. It would also

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89. R. NOZICK, *supra* note 1, at 85-86 (footnote omitted).

be outrageous to say a) that he is permitted to refuse all offers and publish, but b) if he accepts any offer for his silence it can be for no more than full compensation. What happens if he is willing to remain silent only if he receives more than full compensation and somebody is willing to pay his price? It is not consistent with Nozick's theory to keep people from reaching mutually beneficial agreements which do not cross others' boundaries.<sup>90</sup>

Nozick's position on what the author can charge is problematic for another reason. Unless there is something special about speech, which Nozick never contends, there does not appear to be any difference between the author and the next door neighbor in the following example: "If your next-door neighbor plans to erect a certain structure on his land, which he has a right to do, you might be better off if he didn't exist at all. (No one else would choose to erect that monstrosity.) Yet purchasing his abstention from proceeding with his plans will be a productive exchange."<sup>91</sup> Nozick believes that in this case you must pay your neighbor market compensation, unless his sole motive in erecting the structure is to get you to pay him not to erect it. On what grounds can Nozick say that market compensation is appropriate here while merely full compensation is appropriate for the right to prevent the author from publishing the damaging information? Nozick cannot simply say that the neighbor has the *right* to erect the monstrosity while the author does not have the right to publish the information. The fact that the author is entitled to full compensation when he is prohibited from publishing the information indicates that he also has the right to publish the information. The question is why we must pay market compensation to cross a person's boundary in one case and only full compensation in the other. Nozick never answers this question. He cannot say that the exchange to prevent the erection of the monstrosity is a productive exchange while the exchange to buy

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90. The problem is determining when it is permissible for one person to sell his silence and when it is permissible for one person to offer to buy another's silence. It would seem that the correct solutions must examine and evaluate the consequences of adopting alternative policies. This approach is not available to Nozick since it is incompatible with *I*, and since it presupposes an account of the public interest which is enforceable against people without their consent. Nozick says that it is permissible to prohibit a person who violates another's rights from bribing his victim to keep quiet. *Id.* at 67. His justification for the prohibition is that the system which permits these bribes will lead to uncompensated for fear. This justification is incompatible with *I* and, therefore, is unavailable to Nozick if he wishes to remain consistent.

91. *Id.* at 84 (footnote omitted). I take issue with Nozick's claim that purchasing this person's abstention would be a productive exchange. It seems much more appropriate to classify it as a "semiproductive exchange." See text & note 92 *infra*. Nozick discusses problems relating to free speech at 129-130, 264-265, and 342 n.6. Nothing he says, however, suggests that there is anything special about speech for the problem we are presently considering.

the author's silence is not. In each case one party to the exchange can complain that he is worse off than he would have been if the other did not exist at all. Nor can he say that one is an unproductive exchange while the other is not. Neither the neighbor nor the author does his act for the purpose of getting somebody to pay him not to do it.

What Nozick needs are new categories of exchange and new principles correlated with them. We will say that a semiproductive exchange is one in which one person serves another semiproductively and we will adopt the following account of "X serves Y semiproductively": X serves Y semiproductively when: Y is not better off as a result of his voluntary exchange with X than he would have been in the event X did not exist at all or had nothing to do with him; the exchange is one in which Y buys X's abstention from doing an act; but X's motive for doing the act is not to sell Y his abstention.<sup>92</sup> The exchange to pay your neighbor not to build the monstrosity and the exchange to pay the author not to publish would both be semiproductive. Furthermore, an exchange in which a risk-bearer pays a risk-creator to refrain from performing a risky act would also be a semiproductive exchange, provided the risk-creator's motive in performing the risky act was not simply to sell the risk-bearer his abstention.

Nozick believes that a person who intentionally throws a rock through my window or intentionally tramples my lawn violates my property rights. He also believes that a person who accidentally does either also violates my property rights. In each case the person does something which lowers the value of my property and in each case the person must compensate me for the harm he caused. Why is it not equally clear that the person who builds the monstrosity for the sole purpose of lowering the value of my property also crosses the boundary defined by my property rights? Why is it not equally clear that the person who builds the monstrosity because he believes it is beautiful, but who nonetheless lowers the value of my property, also crosses the boundary defined by my property rights? Nozick must answer these questions. He must tell us which acts which lower the value of my property also cross the boundary defined by my property rights. Furthermore, his explanation for why some do while others do not cannot appeal to the beneficial consequences of living in a system which treats them differently. This is because an explanation which appeals to those consequences would be incompatible with *I*.

Furthermore, once he explains the basis for this distinction he will

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92. Nozick never actually uses the expression "semiproductive exchange." However, he introduces the concept and uses it when he states the principle of compensation. See R. Nozick, *supra* note 1, at 86.

still have the problem of how to assign entitlements in those cases where the acts do cross another's boundary. He must defend his view that different entitlements are appropriate for different acts. Some acts are permitted provided those who do them compensate those whose boundaries they cross. Others are forbidden so that those who want to perform them must pay market compensation for the right to perform them. Still other acts are permitted but those whose boundaries are threatened have the right to prohibit the acts provided they compensate those whose liberty they restrict.<sup>93</sup> Again, Nozick's explanation for treating different acts differently must not appeal to the beneficial consequences of living in a system which treats them differently.

Nozick does not, as far as I can tell, offer a systematic account of how to solve these problems. All are related to the concept of semiproductive exchange because all are problems about how to assign entitlements in cases where, no matter how we assign entitlements, the following conditions are satisfied: (1) at least one of the parties can complain that he is worse off than he would have been in the situation in which the other did not exist at all or had nothing to do with him; and (2) the exchange in which one pays the other to refrain from doing the act which makes him worse off is a semiproductive exchange. Some very important social problems, in addition to the problem of assigning entitlement in risky situations, are associated with the concept of semiproductive exchange. We will see that Nozick's solutions to these problems leave much to be desired.

If it is permissible to prohibit the publication of information by a person whose sole motive for publishing it is to sell you his abstention, then it should certainly be permissible to prohibit the publication of information by a person whose sole motive is to injure you. Similarly, if it is permissible to prohibit a person from building a monstrosity where his sole motive is to sell you his abstention, then it certainly should be permissible to prohibit a person from building a monstrosity where his sole motive is to injure you by lowering your property values. Neither of these persons wants to be bought off. The first wants to delight in the spectacle of your embarrassment while the second wants the pleasure of seeing you suffer a financial loss. However, an exchange in which you pay either person to refrain from doing his act would be a semiproductive, rather than an unproductive exchange. Therefore, Nozick cannot appeal to *UP* to justify the prohibition of either. He must adopt a new principle which implies that it is permis-

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93. We will discuss which acts fall into this category when discussing the principle of compensation later in this Article. See text & notes 116-60 *infra*,

sible to prohibit each of these people *provided you properly compensate him.*

There is a problem in determining what is to count as proper compensation in these cases. Is this a case where no compensation is due the other party?<sup>94</sup> Or, are these people entitled to compensation for the pleasure they lose because their desire to injure others is frustrated? Nozick discusses one case which is like the cases under consideration. It is the case of a person who reveals information about others because he delights in revealing secrets.<sup>95</sup> Nozick claims that when this person is prohibited from revealing information about others he must be compensated for his lost pleasure. It seems incredible to me that a person who appeals to the idea that it is never permissible to use another merely as a means can say that this person, who is using another's embarrassment as a means to his ends, must be compensated for the loss of pleasure he suffers when he is prohibited from revealing information about the other. It will not do for Nozick to respond that political philosophy is only concerned with cases where one person uses another as a means by physically aggressing against him.<sup>96</sup> This is because it is Nozick who insists it is permissible to prohibit blackmail. It is not clear whether Nozick wants to say that the blackmailer, who clearly uses another as a means, is an aggressor. It is clear, however, that blackmail is not an example of physical aggression. If Nozick wants to keep *UP*, he should retract his view that the person who is prohibited from revealing secrets must be compensated for his lost pleasure.

I have suggested that Nozick's position on blackmail rests on his commitment to *UP*. Is *UP* a reasonable principle? Consider the following examples:

1. Smith owns a store. There is not enough business in town to support two stores of its type. Jones threatens to open a store of that type for the sole purpose of getting Smith to pay him not to open it;
- 1'. Jones hates Smith and his sole motive for opening up a store is to drive Smith out of business and into financial ruin;
2. Jack is very fond of Mary. Jim, the campus Romeo, threatens to take her out for the sole purpose of getting Jack to pay him, by doing his physics problems, for not taking her out;
- 2'. Jim hates Jack and his sole motive for taking Mary out is to cause Jack great anxiety;

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94. See text accompanying note 87 *supra*.

95. R. Nozick, *supra* note 1, at 86 n.

96. *Id.* at 32.

3. Otto tells his neighbor Archie, who hates blacks, that he intends to sell his house to blacks for the sole purpose of getting Archie to pay him not to sell to blacks;
- 3'. Otto's sole motive in selling his house to a black family is to cause Archie great anxiety.

Nozick's commitment to *UP* forces him to say that it is permissible for Smith to prohibit in case 1, for Jack to prohibit in case 2, and for Archie to prohibit in case 3. Furthermore, if I am correct that it is implausible to claim both that it is permissible to prohibit a person from doing an act when his sole motive in doing it is to sell you his abstention and that it is not permissible for a person to do the same act when his sole motive for doing it is to injure you, Nozick must also say that Smith may prohibit in case 1', Jack may prohibit in case 2', and Archie may prohibit in case 3'. Does Nozick want these conclusions?

Nozick leaves no doubt that he wants to retain his position that it is permissible to prohibit blackmail. He makes a point of contrasting it with the standard libertarian position on blackmail:

Contrast our view of blackmail with the following, which sees it as on a par with any other economic transaction: "Blackmail would not be illegal in the free society. For blackmail is the receipt of money in exchange for the service of not publicizing certain information about the other person. No violence or threat of violence to person or property is involved."<sup>97</sup>

Nozick may be able to retain his position on blackmail without committing himself to a principle as powerful as *UP*. He may, however, prefer to keep *UP* and argue that people in the state of nature would give up their right to enforce such a powerful principle because each fears that others will improperly apply it against him. This fear is reasonable since a person can apply *UP* only by making a judgment about another's motives. People can avoid this fear by using their natural right of contract to agree to a less powerful, but more practical, principle which includes a prohibition on blackmail. Clearly, Nozick must tell us more about these things.

Does the blackmailer act aggressively? It seems to me appropriate to say that a person who does an act for the sole purpose of selling another his abstention and a person who does an act for the sole purpose of making another worse off both act aggressively *even when their acts do not threaten to cross the boundary defined by another's rights*. The fact that Nozick claims both that he accepts the libertarian side

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97. *Id.* at 86 n. (quoting 1 M. ROTHBARD, *MAN, ECONOMY, AND STATE* 443 n.49 (1962)).

constraint against aggression and that it is permissible to use force to prohibit blackmail suggests that he believes the blackmailer acts aggressively. If the blackmailer acts aggressively, then it seems only reasonable to say that the other person who does an act for the sole purpose of making another worse off also acts aggressively. Furthermore, in each of these cases we can say of the person's act that its prohibition leaves the person no worse off than he would have been in the situation in which his intended victim did not exist at all and it is an example of an act that uses another merely as a means. We can begin to see some connection between Nozick's concept of unproductive exchange, his root idea that it is never permissible to use another merely as a means, and the concept of aggression he must have in mind when he talks about the libertarian side constraint that prohibits aggression.

Even if Nozick says that the blackmailer and the person who does an act for the sole purpose of making another worse off act aggressively, he does not have to go straight to the conclusion that it is permissible to prohibit their acts. He can, instead, adopt the view that it is only permissible to prohibit aggressive acts which threaten the boundary of another's rights. This is, I believe, the standard libertarian position. None of the criticisms that follow depends on which position he adopts.

### ARE RISKY ACTS SPECIAL?

The problem of assigning entitlements in risky situations is difficult for Nozick because each of the natural assignments leaves at least one person with the complaint that he is worse off than he would have been in the event the other did not exist at all or had nothing to do with him. The natural assignments are:

1. The risk-bearer is entitled to prohibit. The risk-creator must get the risk-bearer's consent to do the act and must pay market compensation for the consent.
2. The risk-creator is permitted to do the act provided that he compensates the risk-bearer in case his act actually crosses the risk-bearer's boundary. The risk-bearer must pay the risk-creator for the right to be free from the risk.

In the first case the risk-creator can complain because the risk-bearer may, acting within his rights, prohibit him from doing the act. The risk-creator would certainly be better off in the situation in which the risk-bearer did not exist. In the second case each appears to have a complaint. The risk-creator can complain because he must pay the risk-bearer for any injuries which he suffers in case his boundary is actually crossed. If the risk-bearer did not exist there would be one less cost associated with the performance of his risky act. The risk-

bearer can complain because he must live in a world of increased risk. Although he is entitled to be compensated in case his boundary is actually crossed, he is not entitled to compensation for fear he suffers because of the increased risk.

There are two reasons which might incline us to adopt the first assignment of entitlements. One is that it appears to give only one person, the risk-creator, a ground for complaint. The risk-bearer has no complaint so long as we view the risk-creator's act as an isolated act and abstract from the fact that the risk-bearer will sometimes also be a risk-creator. Nozick's commitment to *I* forces him to view it this way. The other is that a prohibition of the risky act does not appear to threaten the boundary defined by the risk-creator's rights. In fact, however, Nozick appears to adopt the view that people sometimes have the right to perform risky acts:

We have rejected the view that the prohibition of risky activities is illegitimate, that through prior agreements and open negotiations people must be induced to agree voluntarily to refrain from the activities. But we should not construe our case *merely as compensation for crossing a border that protects another's risky action*, with the requirement of prior negotiation obviated by the special nature of the case (it doesn't involve any productive exchange).<sup>98</sup>

Where does the right to perform risky actions come from? It appears to come from a presumption in favor of liberty which is at the root of Nozick's theory. Consider the following:

Does someone violate another's rights by performing an action without sufficient means or liability insurance to cover its risks? May he be forbidden to do this or punished for doing it? Since an enormous number of actions do increase risk to others, a society which prohibited such uncovered actions would ill fit a picture of a free society as one embodying a presumption in favor of liberty, under which people permissibly could perform actions so long as they didn't harm others in specified ways.<sup>99</sup>

We should note two things about the presumption in favor of liberty. One is that it undermines our inclination to favor the first assignment of entitlements and, therefore, leaves us puzzled about how to assign entitlements in risky situations. The other is that it would be implausible for Nozick to claim that it creates a right to perform any risky act. I will now explain why it would be implausible.

Consider each of the following cases:

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98. R. Nozick, *supra* note 1, at 86-87 (emphasis added).

99. *Id.* at 78.

1. The risk-creator's sole motive for doing the act is to get the risk-bearer to pay him not to do it;
2. The risk-creator's sole motive for doing the act is to make the risk-bearer suffer fear that he might be its victim;
3. The risk-creator's sole motive for doing the act is to satisfy some desire  $D$  and the imposition of the risk is an essential means to the satisfaction of  $D$ .

In each of these cases it seems appropriate to say both that the risk-creator uses the risk-bearer merely as a means and that the risk-creator acts aggressively. We should expect Nozick to say that the risk-creator has no right to perform his act and, therefore, no claim to compensation when he is prohibited from performing it.<sup>100</sup>

Much to our surprise we discover that Nozick adopts a different view:

If using the dangerous process is the only way *that* person can earn a living (and if playing Russian roulette on another with a gun of 100,000 chambers is the only way *that* person can have any enjoyment at all—I grant that these are both extravagant suppositions), then perhaps this person should be compensated for the prohibition.<sup>101</sup>

Nozick's claim that the person who plays Russian roulette may be entitled to compensation is puzzling. He should welcome the conclusion that it is permissible to prohibit his game without payment of compensation. Does not his game clearly involve the use of another as a means? How can Nozick claim both that it is permissible for Sam to prohibit John from taking his rope for the sole purpose of saving his daughter's life without paying John any compensation and that it is impermissible to prohibit the person from playing Russian roulette on another for the sole purpose of having some enjoyment unless compensation is paid? How can the fact that one is certain to cross another's boundary while the other only creates a risk of crossing another's boundary make such a big difference? I do not believe that Nozick can answer this question. Therefore, I offer the following principle, which appears to be a natural amendment to Nozick's theory: It is permissible for any person  $P$  to prohibit any person  $Q$  from doing any act  $A$  which threatens to cross  $P$ 's boundary when  $P$ 's prohibition of  $A$  leaves  $Q$  no worse off than he would have been in the situation in which  $P$  did not exist at all. Furthermore,  $P$ 's permission to prohibit is not contingent on payment of any compensation to  $Q$ .

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100. Nozick appears to say this about the act in example (1) but not about the acts in (2) and (3). See *id.* at 86.

101. *Id.* at 82 (emphasis in original).

Should the distinction between acts which are certain to cross another's boundary and acts which only create a risk of crossing another's boundary be an important distinction for Nozick? I have already suggested that it is natural to divide risky acts into two categories: those whose prohibition leaves the risk-creator no worse off than he would have been in the situation in which the risk-bearer did not exist at all; and those whose prohibition leaves the risk-creator worse off than he would have been in the situation in which the risk-bearer did not exist at all. Since actions in the first category involve the use of another merely as a means, Nozick should classify them as aggressive actions and welcome the conclusion that it is permissible to prohibit them without payment of compensation to the risk-creator. The difficult problem for Nozick is determining when it is permissible to prohibit the non-aggressive risky acts which fall into the second category. A prohibition of one of these acts crosses the boundary defined by the risk-creator's right to perform risky acts, and leaves the risk-creator worse off than he would have been if the risk-bearer did not exist at all or had nothing to do with him.

It also appears natural to divide acts that are certain to cross another's boundary into two categories: those whose prohibition leaves the person who wants to perform the action no worse off than he would have been if the person whose boundary he threatens did not exist at all; and those whose prohibition leaves the person who wants to perform the action worse off than he would have been if the person whose boundary he threatens did not exist at all. John's taking of Sam's rope and Bob's assault on Jim fall into the first category. Does Nozick want the conclusion that the entitlements which resolve the disputes between Sam and John and Jim and Bob should apply in any case where a person wants to perform an action that is certain to cross the boundary defined by another's rights, and the person can easily find out whether the person whose boundary is threatened will give his consent to the crossing? Or, does Nozick want the conclusion that we need a new assignment of entitlements when the action falls into the second category? Recall that *PE* and *UP* do not apply to actions in the second category.

Consider the following hypothetical situations:

1. There are termites on Luke's property which pose a threat to his house. The only way to prevent the deterioration of his house is to use a chemical which has the side effect that it will kill all tomato plants within 100 feet. Luke's neighbor, Matthew, grows tomatoes which are certain to be destroyed by Luke's use of the chemical. Furthermore, Matthew is the only distributor of the

chemical. Is Luke permitted to take the chemical from Matthew, regardless of whether Matthew consents, provided he compensates Matthew for the amount of chemical he uses and for the destruction of his tomato plants?

2. The same as above, except that Luke can purchase the chemical at his local hardware store. Is Luke permitted to use the chemical, regardless of whether Matthew consents, provided he compensates Matthew for the destruction of his tomato plants?

3. Luke discovers there are termites on his property which, if he does nothing, will begin to destroy his house. The cheapest way for him to protect his house is by injecting a chemical in the ground around his house. This chemical will not kill the termites. It will only prevent them from destroying his house. A side effect of his use of this chemical is that the termites will move on to the next house which happens to be Matthew's. The termites will destroy Matthew's house unless he pays to protect it. Is Luke permitted to use the chemical, regardless of whether Matthew consents, without payment of any compensation?

Nozick would, I believe, say that the first case is indistinguishable from the Sam and John case.<sup>102</sup> An exchange in which Luke pays Matthew to give him some of the chemical would be a productive exchange. Luke's taking the chemical, after Matthew has refused to sell it, would amount to aggression. Whether or not it is physical aggression depends on whether Luke uses force or trickery.<sup>103</sup>

What would Nozick say in the second and third cases? In each case either of the two natural assignments of entitlements will leave at least one person with the complaint that he is worse off than he would have been in the situation in which the other did not exist at all or had nothing to do with him. The only difference between these cases and cases of nonaggressive risky acts is that these involve acts which are certain to cross another's boundary. If neither of the natural assignments is appropriate in cases of nonaggressive risky acts, then how can it be appropriate in these cases?<sup>104</sup> Nozick might want to say that in case (3)

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102. See text & notes 53-79 *supra*. They need not be identical, for a person who believes that whether or not it is permissible to cross another's borders without his consent, provided full compensation is paid, depends on what the consequences of not permitting the crossing are *might* distinguish the cases on the ground that the consequences of not permitting John to cross are much worse than the consequences of not permitting Luke to cross.

103. Nozick claims it is permissible to prohibit fraud. See R. NOZICK, *supra* note 1, at 26, 150. Since fraud does not involve the use of physical aggression we may wonder why it is permissible to prohibit it. Are fraudulent acts aggressive in some other sense? They do not appear to be aggressive in the same sense that blackmail is. Here I merely note that Nozick owes us an explanation of why it is permissible to prohibit fraud and that this explanation must not, if it is to be compatible with *I*, appeal to the beneficial consequences of living in a system which prohibits fraud.

104. There are, in fact, places where Nozick suggests that we cannot distinguish acts,

Luke is permitted to use the chemical, regardless of whether Matthew consents, and does not have to pay Matthew any compensation for the costs he imposes on him. He might try to justify this conclusion by saying that Luke's use of the chemical does not cross the boundary defined by Matthew's rights to his land and his home. This will work, however, only if we are given an explanation of why Luke's use of the chemical, which certainly lowers the value of Matthew's property, does not amount to a violation of Matthew's property rights. Furthermore, this explanation must be compatible with *I*. We never get this explanation. Nozick does, however, appear to offer an explanation for how to assign entitlements in case (2). Much to our surprise he appears to believe that it is appropriate to make Luke pay market compensation for the right to use the chemical.

The evidence that Nozick believes that it is appropriate to make Luke pay market compensation comes in a footnote. He writes:

One may be tempted to delimit partially the area where full compensation is permissible by distinguishing between using something as a resource in a productive process and damaging something as a side effect in a process. Paying only full compensation would be viewed as permissible in the latter case, and market prices as desirable in the former, because of the issue of dividing the benefits of economic exchange. *This approach won't do, for dumping grounds for effects are also priceable and marketable resources.*<sup>105</sup>

Nozick appears to be saying that a person whose nonaggressive act incidentally, but certainly, will cross the boundary defined by another's rights, must pay market compensation for the right to perform that act. If he cannot negotiate a price with the person whose boundary he threatens, then he must refrain from performing the act. This position is surprising because it appears to ignore the fact, which is essential to his position on when it is permissible to prohibit a person from performing a nonaggressive risky act, that the person who is prohibited can complain that he is made worse off than he would have been in the situation in which the other did not exist at all or had nothing to do with him. The only support which Nozick provides for his position is that "dumping grounds for effects are also priceable and marketable resources." Will this do?

It seems clear that it will not. There does not appear to be any market which is prevented from emerging when we adopt an alterna-

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for the purpose of assigning entitlements, merely on the basis that one is more likely to cross a person's border than the other. See his discussion of risky acts in the state of nature, *id.* at 74-75, and his discussion of preemptive attack. *Id.* at 126-27.

105. *Id.* at 64 n. (emphasis added).

tive assignment of entitlements which permits Luke to use the chemical provided he compensates Matthew for the destruction of his tomato plants. Furthermore, it would appear that markets for dumping grounds would emerge even if we adopt the view that a person who must decide where to build and operate a factory is permitted to build and operate on any land he has legitimately acquired, provided he pays full compensation to those upon whom his factory dumps its effects. This assignment of entitlements will not make him indifferent about where to build. How much full compensation will be depends on how many people it dumps its effects on and who those people are. People with different tastes and different amounts of wealth will require different amounts to make them indifferent between receiving that amount and being a dumping ground and not receiving anything and not being a dumping ground. Since payment of full compensation will only be one cost of operating a factory, since it would be extremely risky to build a factory without some reasonable estimate of what those costs will be, and since it would be extremely expensive to find out what those costs would be, the rational strategy for the factory builder to adopt would be to first pick the sites which are the cheapest for reasons which have nothing to do with the costs of paying full compensation to those upon whom the factory will dump its effects. This will involve checking whether the site is near a source of the type of labor which will be needed, whether it is near existing transportation facilities, and whether it is near a supply of the natural resources which will be needed. Then, he should make bids to the people in each of those areas for the right to dump the factory's effects upon them. Finally, he should choose the site which is, all things considered, the cheapest site for operating the factory. We must recall that a person is subject to punishment when he does the joint act of crossing the borders defined by another's rights and failing to pay compensation. It follows that it would be extremely irrational to open a factory without first ascertaining the cost of paying full compensation to those upon whom the factory dumps its effects. Although Luke risks neither bankruptcy nor punishment, since he can reasonably estimate the value of Jake's tomato plants, the factory owner who simply goes ahead and builds appears to risk both. For these reasons it is reasonable to say that most people who end up as dumping grounds for effects will receive market compensation and that markets for dumping grounds will emerge.

We must stop and wonder, however, whether it is legitimate for Nozick to defend a particular assignment of entitlements in case (2) on the ground that it is the only assignment which will lead to the emergence of a market. Is not this approach clearly incompatible with *I*?

When Nozick discusses the problem of how to assign entitlement when a person does a nonaggressive risky act he is insistent that we must evaluate each risky act as an isolated act. How can he argue that it is reasonable to adopt *I* as a constraint when we solve that problem but not when we solve the problem of assigning entitlements when a person does a nonaggressive act which is certain to cross another's boundary? I am not suggesting that he should adopt *I* as a constraint in the latter case. In fact, it will become clear that I believe he should reject it as a constraint in both cases.

I believe I have established that the distinction between acts that are certain to cross another's boundary and acts which only create a risk of crossing another's boundary is *not* the distinction upon which Nozick should focus. The important distinction appears to be between the following types of acts: those which threaten (they are certain to cross or create a risk of crossing) the boundary defined by another's rights where the agent uses the crossing of the boundary as a means to his ends or as his end; and those which threaten to cross the boundary defined by another's rights where the crossing is merely incidental to the agent's pursuit of a legitimate end. *PE* and *UP* apply to acts of the first type. Additional principles are needed for acts of the second type. In order to determine which type a particular act is we must examine the relation between the person's reasons for doing the act and the crossing. We must ask whether he was using the crossing as a means to his end or whether the crossing was merely incidental to his pursuit of his end. It is appropriate that Nozick, who appeals to the root idea that it is never permissible to use another merely as a means, should be forced to ask this question. Any future development of his theory must certainly tell us more about how to distinguish between crossings which are means to a person's ends and crossings which are merely incidental to the pursuit of a person's ends.

Even if we grant Nozick his apparent belief that *PE* and *UP* are acceptable principles, he must still solve the problem of when it is permissible to prohibit a person from doing an act which threatens another's boundary when one of the following conditions is satisfied: the act is a nonaggressive act; the crossing will be an incidental effect of the agent's pursuit of a legitimate end; or the prohibition of the act will leave the agent worse off than he would have been in a situation in which the person whose boundary is threatened did not exist at all or had nothing to do with him. This type of problem is emergent relative to the supposedly clear beliefs we have in cases where *PE* and *UP* apply. Furthermore, we can confidently say that Nozick does not offer any compelling theoretical reason for his apparent belief that we should

adopt one solution when the act is certain to cross another's boundary and a different solution when the act only creates a risk of crossing another's boundary.<sup>106</sup> Nozick's apparent belief becomes all the more puzzling when we note just how different these solutions are from each other.

With regard to nonaggressive acts which are certain to cross boundaries he appears to adopt the view, as seen in his discussion of dumping grounds, that the person who wants to do the act must pay market compensation for the right to do it. This position is extremely nonlibertarian. Where has the presumption in favor of liberty gone? With regard to nonaggressive acts which only create a risk of crossing another's boundary we shall see that he adopts the following view: It is permissible to prohibit only when the risk is so great that it will create uncompensated fear, and the person who is prohibited must be compensated for any disadvantages he suffers as a result of the prohibition.<sup>107</sup> This position pays great deference to the presumption in favor of liberty.

In the remaining three sections I am going to examine Nozick's solution to the problem of how to assign entitlements in cases of nonaggressive risky acts. Unlike the problem of how to assign entitlements in cases of nonaggressive acts which are certain to cross another's boundary, he discusses this problem at length. Since his solution in cases of nonaggressive acts which are certain to cross is presented in a footnote and is apparently inconsistent with other things he says, it is best to assume that he owes us a solution. I will not simply assume, even though the assumption is reasonable, that the solution which applies in cases of risk should also apply in cases of certainty. In the next section I will consider whether Nozick can offer any compelling reasons why we should adopt *F* and *I* as constraints on solutions to the emergent problem of how to assign entitlements in cases of nonaggressive acts which threaten to cross another's boundary. In the last two sections I will argue that his solution to the problem of how to assign entitlements in cases of nonaggressive risky acts has counterintuitive and embarrassing implications.

#### ARE *F* AND *I* DEFENSIBLE CONSTRAINTS?

I will examine five arguments Nozick might offer to defend the view that we should solve the emergent problem of nonaggressive risky acts in a way which is compatible with *F* and *I*.

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106. See discussion note 104 *supra*.

107. See R. NOZICK, *supra* note 1, at 82-83.

1. The individualist anarchist, whose doubts about the possibility of providing a justification of the state we are trying to answer, will only accept a solution which is compatible with *F* and *I*.
2. It is only by appealing to principles which are compatible with *F* and *I* that we will be able to provide an invisible hand explanation of the state.
3. It is only by appealing to principles which are compatible with *F* and *I* that we will be able to provide a fundamental explanation of the political realm.
4. The root ideas of the correct moral theory, which are firmly grounded in our clear beliefs about people's entitlements in situations of productive exchange and unproductive exchange, commit us to principles which are compatible with *F* and *I*.
5. A moral theory which includes only principles which are compatible with *F* and *I* is, other things equal, preferable to a moral theory which includes principles which are not compatible with *F* and *I* as well as principles which are. Since principles which are not compatible with *F* and *I* have no advantages over principles which are we must, on grounds of simplicity, accept principles which are.

I do not claim that Nozick actually offers each of the above arguments. Unfortunately, Nozick never offers a systematic defense of his use of *F* and *I*.<sup>108</sup> All we can do, therefore, is explain how *F* and *I* are related to other theses which play a prominent role in the book and examine whether these other theses provide any support for his commitment to *F* and *I*.

It would be interesting to prove to the anarchist, who only accepts principles which are compatible with *F* and *I*, that it is possible to provide a justification of the state which only appeals to principles which he accepts. It would also be interesting to prove to the utilitarian or the perfectionist that it is possible to provide a justification of the state which only appeals to principles he accepts. We might, therefore, want to prove to the individualist anarchist that even he must accept some principles for solving the problem of when any person acting alone in the state of nature is entitled to prohibit another person from performing a risky act or using a risky procedure. We might then try to show him that these principles can also be used to justify a prohibition on the use of procedures for determining whether or not one person has violated

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108. See text & notes 38, 40 *supra*, where I note that Nozick appears to give up *F* and *I* as constraints on the solutions to other emergent problems. Not only does Nozick owe us an explanation of why we should accept them as constraints on the solution to the problem of nonaggressive risky acts, but he also owes us an explanation of why they are appropriate as constraints on solutions to some emergent problems but not others.

another person's rights which subject innocent people to too high a risk of being found guilty. A person's rights are violated when he is punished for doing an act which he did not do. This will be part of an argument to show him that, contrary to his initial doubts, the state can offer a justification of its prohibition on his private enforcement of his rights which he must accept. This argument will be of purely academic interest, however, unless it is preceded by an argument that the moral theory the individualist anarchist appeals to is the correct moral theory. We ask the individualist anarchist, as we have already asked Nozick, to justify his belief that the correct moral theory must accept *F* and *I* as constraints on the solution to the emergent problem of non-aggressive risky acts.

It is of interest to note that there is no necessary connection between the individualist anarchist's commitment to *F* and *I* and his doubts about the possibility of providing a justification of the state. We can imagine an individualist anarchist who concedes that the correct solution to the emergent problem of nonaggressive risky acts must give up both *F* and *I*. We can even imagine that he further believes that once we accept principles which are incompatible with *F* and *I* we must adopt the natural position. That is, we must adopt special principles for the problem of evaluating procedures for determining which people are entitled to publish and enforce the laws that are needed to satisfy the principles which are incompatible with *F* and *I*, and also the principle that each person has a natural duty to do his fair share in establishing and maintaining procedures which satisfy these special principles. Still, he may have doubts about the possibility of providing a justification of the state, because he believes that there are some principles which any person acting alone in the state of nature is entitled to enforce. He does not have to believe, as a person who accepts *F* does, that all enforceable principles are principles which any person acting alone in the state of nature is entitled to enforce. So long as he believes there are some principles which any person acting alone in the state of nature is entitled to enforce he has a reason to wonder how any state can justify a prohibition on the private enforcement of these principles. An argument that any person acting alone in the state of nature is entitled to enforce *PE* is sufficient to throw doubt on the possibility of providing a justification of the state!

We are now in a position to see that a commitment to *F* and *I* is not necessary to explain how a state would naturally arise from a state of nature by morally permissible means without anybody intending it. Nozick calls this type of explanation an "invisible-hand explanation," and believes there is something especially satisfying about it:

There is a certain lovely quality to explanations of this sort. They show how some overall pattern or design, which one would have thought had to be produced by an individual's or group's successful attempt to realize the pattern, instead was produced and maintained by a process that in no way had the overall pattern or design "in mind." After Adam Smith, we shall call such explanations *invisible-hand explanations*.<sup>109</sup>

Regardless of whether we adopt Nozick's enthusiasm for invisible hand explanations we should note that it is one thing to provide an invisible hand explanation of the political realm and quite another to provide an invisible hand explanation of the state.

A person who believes there are some principles which are incompatible with *F* and *I* and who accepts the natural position cannot provide an invisible hand explanation of the political realm. On his view, people who found themselves in the state of nature and who acted on the correct moral principles would intend to establish a political realm. They would act on the natural duty to establish and maintain just procedures for determining which people are entitled to publish and enforce the laws which are needed to satisfy the principles which are incompatible with *F* and *I*. Under this view it is trivial to explain how a political realm, or central authority, would emerge from the state of nature by morally permissible means. However, the central authority which emerged would not be a state. It would have the sole entitlement to publish and enforce the laws that are needed to satisfy the principles which are incompatible with *F* and *I*. It would not have the sole entitlement to enforce the principles which any person acting alone in the state of nature is entitled to enforce. We can still give an invisible hand explanation of the state if we can explain how this central authority can justify each of the following as an incidental side effect of its legitimate pursuit of some other aim: a prohibition on the private enforcement of those principles which any person acting alone in the state of nature is entitled to enforce; and the provision of free protective services to those people in the area who do not have the means to pay for the protective services which the central authority provides to all in the area.<sup>110</sup> Even if we grant that there is something special about

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109. R. Nozick, *supra* note 1, at 18 (emphasis in original).

110. It turns out that Nozick does not provide a justification for the state. He concedes that the protective association is not permitted to prohibit independents from privately enforcing their rights against other independents. *Id.* at 114. He says that an independent who is prohibited from privately enforcing his rights, but who has the resources to pay for the protection he will receive, must pay for that protection. *Id.* at 112. If he does not pay, he will not receive protection. Finally, the protective association is not permitted to prohibit people who use reliable procedures from privately enforcing their rights. Nozick has, at best, explained how a state-like entity would

an invisible hand explanation of the state, so that we should prefer it to another kind of explanation of the state, we cannot go straight to a general commitment to *F* and *I*.<sup>111</sup>

One reason Nozick believes that an invisible hand explanation of a realm is so satisfying is that it is often also a fundamental explanation of a realm. In other words, one should not only aspire to provide an invisible hand explanation of the state, but should also aspire to provide a fundamental explanation of the political realm. Consider the following passages from Nozick's work:

The possible ways of understanding the political realm are as follows: (1) to fully explain it in terms of the nonpolitical; (2) to view it as emerging from the nonpolitical but irreducible to it, a mode of organization of nonpolitical factors understandable only in terms of novel political principles; or (3) to view it as a completely autonomous realm. Since only the first promises full understanding of the whole political realm, it stands as the most desirable theoretical alternative, to be abandoned only if known to be impossible. Let us call this most desirable and complete kind of explanation of a realm a *fundamental explanation* of the realm.<sup>112</sup>

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.... Fundamental explanations of a realm are explanations of a realm in other terms; they make no use of any of the notions of the realm. Only via such explanations can we explain and hence understand everything about a realm; the less our explanations use notions constituting what is to be explained, the more (*ceteris paribus*) we understand.<sup>113</sup>

It is important to note that Nozick is only interested in moral explanations of the political realm. He does not, as far as I can tell, make any distinction between providing an explanation of the political realm and explaining how a political realm would arise from the state of nature by morally permissible means. Providing a justification of the political realm and providing an explanation of the political realm are the same thing. We can go from a justification (explanation) of the political

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arise from a state of nature by what he considers morally permissible means. The individualist anarchist might readily accept this.

111. A person who gives up *F* and *I*, and who accepts some version of the enforceable fairness principle, (see text & notes 142-47 *infra*), can use it to provide a justification of the state. It is not clear to me why people who use this principle to justify the prohibition on the private enforcement of rights must *intend* to establish a state, while people who use Nozick's principle of compensation to justify the prohibition of the private enforcement of rights *do not intend* to establish a state. It seems to me that both intend to establish a state. The difference between them is that one appeals to a principle which is compatible with *F* and *I* while the other does not. This suggests that the real issue is whether we should accept *F* and *I*.

112. R. Nozick, *supra* note 1, at 6 (emphasis in original) (footnote omitted).

113. *Id.* at 19.

realm to a justification (explanation) of the state by taking the additional step of explaining how any political realm which emerges by morally permissible means will become a state by morally permissible means.

It might now appear that Nozick has a good argument for his commitment to *F* and *I*. A person who accepts principles which are incompatible with *F* and *I* will have to face the difficult problems of who is entitled to publish and enforce the laws which are needed to satisfy those principles. He will, almost certainly, accept the natural position. Once he adopts the natural position, however, he will no longer be able to provide a fundamental explanation of the political realm. This is because its principles are themselves political principles. Once he adopts these political principles and uses them to explain how the political realm will emerge from the state of nature, he will no longer be able to gain full understanding of the political realm. The conclusion we should draw is that if we want to gain full understanding of the political realm, we should retain our commitment to *F* and *I*.

This argument goes much too quickly. Let us return to the emergent problem of when it is permissible to prohibit nonaggressive risky acts. *The sole issue is what the optimal solution to that emergent problem is.* It is no argument for or against a solution that it can or cannot be used to provide a fundamental explanation of the political realm. If we can argue that the optimal solution must appeal to principles which are not compatible with *F* and *I*, and these principles create the need for special political principles for evaluating procedures to determine which people are entitled to publish and enforce the laws needed to satisfy these principles, then how can Nozick claim that our understanding of the political realm is deficient? Where is it deficient? What understanding do we lack?

Since Nozick never gives examples of the other types of explanations of the political realm, I cannot say whether the explanation I have described, which appeals to the special principles assumed by the natural position, falls under either of these types.<sup>114</sup> However, it should be clear that an argument for another type of explanation need

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114. See text accompanying note 112 *supra*. Nozick often contrasts his position with other positions without giving examples of theories which adopt the other positions. Can the reader confidently give examples of moral theories which offer type (2) or type (3) explanations of the political realm? I cannot. We run into the same problem when Nozick says that a person who rejects his account of rights as absolute side constraints has three alternatives but never gives examples of theories which accept each of these alternatives. R. Nozick, *supra* note 1, at 33-34. Which alternative have I committed myself to when I argue that the optimal solutions to the emergent problems will not be compatible with either *F* or *I*? What type of explanation of the political realm do I offer when I argue for the natural position?

not (as Nozick suggests it must) include an argument that it is impossible to provide a fundamental explanation of the political realm.<sup>115</sup> It may be possible to provide a fundamental explanation which is a bad explanation. Nozick must concede this point. He would certainly reject the act-utilitarian explanation of the political realm, which is a fundamental explanation since it explains the political realm without appealing to any special political principles, even if he became convinced that it was the only possible fundamental explanation. This is because the act-utilitarian explanation appeals to an unacceptable moral theory. Similarly, we can reject any other fundamental explanation which appeals to an unacceptable moral theory. This consideration merely brings us back to the point that the real issue, and the only issue, is what the optimal solution to the emergent problem of nonaggressive risky acts is.

There may be reasons internal to moral theory which Nozick can use to justify his commitment to *F* and *I*. Can we appeal to the root ideas of Nozick's moral theory to get an answer? Perhaps these root ideas can be used to explain how we should assign entitlements in cases of productive and unproductive exchange. Furthermore, they may even explain why it is appropriate to assign entitlements in these cases in a way which is compatible with *F* and *I*. However, these root ideas do not force any conclusion about how to assign entitlements in most cases where any choice of entitlements will leave at least one party with the complaint that he is worse off than he would have been in the situation in which the other did not exist at all or had nothing to do with him. If we accept *F* and *I* as constraints on how to assign entitlements in these cases, we must view each act as an isolated conflict between two people in the state of nature. With regard to nonaggressive risky acts, we must abstract from the fact that the person who is a risk-creator in a particular situation will also be a risk-bearer in another similar situation. Nozick does not, so far as I can tell, ever argue that a commitment to any of the four root ideas forces us to make this abstraction.

There is, however, a fifth root idea. It is the presumption in favor of liberty. This presumption will favor solutions compatible with *F* and *I*. By examining each nonaggressive risky act as an isolated act we will almost certainly have to conclude that very few are serious enough to prohibit. For instance, we will not be able to prohibit an act on the ground that it is a member of a group of acts whose cumulative effect is to produce a risk that is so serious that it would be permissible to

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115. R. NOZICK *supra* note 1, at 6.

prohibit any single act which created that risk. However, we cannot go straight from the fact that the presumption in favor of liberty favors solutions compatible with *F* and *I* to the conclusion that we must adopt *F* and *I* as constraints on solutions. We need an additional argument that the only criterion by which to evaluate competing solutions to the emergent problem of nonaggressive risky acts is the number of non-aggressive risky acts each permits. Nozick does not, so far as I can tell, offer this additional argument. Furthermore, this argument is almost certain to fail. A solution which permits the largest number of risky acts will have its costs as well as its benefits. Its main benefit is that it gives each person the maximum number of options to pursue his ends. Its main cost is that it increases the likelihood that each person will be the victim of some other person's risky act. It is hard to believe that the optimal solution is one which totally ignores this cost.

We now come to the last argument based upon simplicity, and which will only work if Nozick can establish that other things are equal. That is, it will only work if Nozick can establish that his solution, which is compatible with *F* and *I*, has all of the desirable properties of the best solution which is incompatible with *F* and *I*. Once we see that the root ideas of Nozick's theory do not force us to accept *F* and *I* as constraints, then we must look for an emergent constraint which will enable us to pick out the optimal solution from all of the solutions compatible with those root ideas. It may, of course, turn out that the optimal solution is compatible with *F* and *I*. Its claim to being the optimal solution will not, however, be that it is compatible with *F* and *I*. It will be that it best satisfies the emergent constraint.

The emergent constraint should identify a property of solutions which will be acceptable to people who accept Nozick's account of the root ideas, concede that these root ideas do not force a conclusion on how to solve the emergent problem, and are willing to adopt an impartial point of view for solving the emergent problem. I suggest that the following constraint is a reasonable constraint: People who accept the principles which that solution appeals to will generally agree that the conflicts which those principles are intended to resolve are resolved in an impartial manner rather than in a manner which reflects the relative power of each of the parties to the conflict. I will eventually argue that Nozick's solution to the emergent problem of nonaggressive risky acts falls far short of satisfying this apparently innocuous constraint. Furthermore, I will argue that it should be rejected in favor of a solution which is incompatible with *F* and *I* and which accepts the natural position.

I have canvassed the arguments Nozick might use to justify his commitment to *F* and *I* as constraints on solutions to the emergent problem of nonaggressive risky acts. I believe I have also proved that none of those arguments force us to accept them as constraints. Furthermore, I have argued that the real issue is what the optimal solution to this emergent problem is, and that we cannot solve this problem without appealing to an emergent constraint which can be used to compare alternative solutions. If Nozick does not like the emergent constraint I have appealed to and which I will use to show that his solution is unacceptable, he can defend another. He cannot, however, avoid the conclusion that a defense of his solution must consist of either a clearer statement of his root ideas which enables him to argue that those root ideas force a commitment to *F* and *I*, or an appeal to some emergent constraint which can be used to justify his solution.

### THE PRINCIPLE OF COMPENSATION

The heart of Nozick's solution to the problem of nonaggressive risky acts (the problem of how to assign entitlements in cases of non-aggressive risky acts) is contained in the following:

What of those cases where only the first condition of unproductive exchange is satisfied, not the second: *X* is no better off as a result of the exchange than if *Y* didn't exist at all, but *Y* does have some motive other than selling abstention. If from *Y*'s abstention from an activity *X* gains only a lessened probability of having his own border crossed (a crossing whose intentional performance is prohibited), then *Y* need be compensated only for the disadvantages imposed upon him by the prohibition of only those activities whose risk is serious enough to justify prohibition in this manner.<sup>116</sup>

In order to apply this principle, which Nozick calls "the principle of compensation," we must be told which acts are "serious enough to justify prohibition in this manner." Nozick certainly wants to say that an act is serious enough when it causes uncompensated for fear in those people whose boundaries it threatens.<sup>117</sup> Nozick also wants to say that we can identify acts which are serious enough to justify prohibition by appealing to the following principle: "If someone knows that doing act *A* would violate *Q*'s rights unless condition *C* obtained, he may not do *A* if he has not ascertained that *C* obtains through being in the best feasible position for ascertaining this."<sup>118</sup> Nozick uses this prin-

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116. *Id.* at 86.

117. *Id.* at 88.

118. *Id.* at 106-07.

ciple to explain why it is sometimes justifiable to prohibit a person from using a risky procedure to determine whether another is liable to punishment for violating the law of nature *even when his use of that procedure does not cause uncompensated fear*. Any procedure for determining guilt will subject innocent people to some risk of being found guilty and, therefore, to some risk of having their rights violated. When a person uses a procedure which is *too risky* compared to the *best procedures available*, then it is permissible to prohibit him from using it, provided he is compensated for any disadvantages he suffers as a result of the prohibition. Nozick is vague about how to determine the best available procedure and whether a particular procedure is too risky.<sup>119</sup> He appears to believe, however, that a procedure may be too risky compared to the best procedure even when a person's use of it does not cause uncompensated fear.<sup>120</sup>

Nozick never explains how a person in the state of nature is supposed to apply the principle of compensation. It would appear, however, that its application involves three steps: First, you must explain to the person who wants to perform the risky act that it is an act which you are permitted to prohibit. Second, you prohibit him from doing the act. That is, you warn him that he will be subjected to punishment if he does the act, regardless of whether his act actually crosses any person's boundary. Third, you offer him an amount of goods which will compensate him for any disadvantages he suffers as a result of the prohibition. If you do all of these things, you are entitled to punish him for doing the risky act. So long as the compensation you offer is adequate, it does not matter whether he accepts the compensation. In the absence of a public warning that he will be punished for doing his nonaggressive risky act, you are only entitled to punish him for failing to compensate those whose boundaries are actually crossed as a result of his performance of the risky act.

Nozick never defends the principle of compensation. He simply writes: "With some justice, I think, I could claim that it is all right as a beginning to leave a principle in a somewhat fuzzy state; the primary question is whether something like it will do."<sup>121</sup> He does, however, offer the following to explain its plausibility:

One might view compensation for disadvantages as a compromise arrived at because one cannot decide between two attractive but incompatible positions: (1) no payment, because dangerous persons may be restrained and so there is a right to restrain them;

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119. *Id.* at 96-98.

120. *Id.* at 105-07.

121. *Id.* at 87.

(2) full compensation, because the person might live unrestrained without actually harming anyone, and so there is no right to restrain him. But prohibition with compensation for disadvantages is not a "split the difference" compromise between two equally attractive alternative positions, one of which is correct but we don't know which. Rather, it seems to me to be the correct position that fits the (moral) vector resultant of the opposing weighty considerations, each of which must be taken into account somehow.<sup>122</sup>

Since Nozick offers no argument for the principle of compensation, we can only attack it by showing that it has counterintuitive implications and appears to be inconsistent with other positions Nozick accepts.

In order to explain why the principle is problematic, we must begin by examining the concept of disadvantage he uses when he states the principle. Nozick concedes that he does not have a theory of disadvantage:

One might use a theory of disadvantage, if one had it, in order to formulate a "Principle of Compensation": those who are *disadvantaged* by being forbidden to do actions that only *might* harm others must be compensated for these disadvantages foisted upon them in order to provide security for others.<sup>123</sup>

The following quotes exemplify what Nozick has in mind when he uses the concept of disadvantage: "Some types of actions are generally done, play an important role in people's lives, and are not forbidden to a person without seriously disadvantaging him;"<sup>124</sup> and "[t]he idea is to focus on important activities done by almost all, though some do them more dangerously than others."<sup>125</sup> Furthermore, he gives the following examples to contrast prohibitions which merely make another worse off with prohibitions which disadvantage:

1. We do not disadvantage a manufacturer when we prohibit him from using a very efficient but very risky means of manufacturing and, consequently, cause him to suffer a decrease in profits. We only disadvantage him when the prohibition leaves him no other way to earn a living.<sup>126</sup>
2. We do not disadvantage a person when we prohibit him from driving a car in an automobile dependent society unless the prohibition forces him to work in the cash market to accumulate the resources to hire a chauffeur or take taxis.<sup>127</sup>
3. We do not disadvantage a person when we prohibit him from

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122. *Id.* at 145-46 (footnote omitted).

123. *Id.* at 82-83 (emphasis in original).

124. *Id.* at 81.

125. *Id.* at 82.

126. See *id.* at 79.

127. See *id.* at 79, 111-12.

"playing Russian roulette on another with a gun of 100,000 chambers" unless that is his only way of having any enjoyment.<sup>128</sup>

The second example brings out the point that whether or not a person is disadvantaged by a prohibition may depend on how wealthy he is. This raises the question whether the principle of compensation is unfair to the wealthy.

Whether or not a person is disadvantaged by a prohibition depends upon comparative considerations. We must compare his situation with the prohibition and without compensation with "the normal situation."<sup>129</sup> If his situation prior to the prohibition is at or above the normal situation and his situation after the prohibition is below the normal situation, the compensation must bring him back to the normal situation. It does not have to bring him back to his situation prior to the prohibition. What happens, however, when his situation prior to the prohibition is below the normal situation and his reason for doing the risky act is to reach the normal situation? What compensation is he entitled to when this risky act is prohibited? Nozick must answer this question. More basically, he must tell us more about what the normal situation is. Is it the normal situation in his society? Is the normal situation some measure of the average well-being in his society? Does it change for the worse when there is a mass immigration or emigration of poor or rich people into the society?<sup>130</sup>

It is clear that people who do not have access to a theory of disadvantage will often disagree on how to apply the principle of compensation. Even if they agree, however, on which risky acts are serious enough to prohibit, when a person is disadvantaged by a prohibition, and what counts as adequate compensation for the disadvantage, there would still be serious disagreements about how to apply the principle. These disagreements can be traced to Nozick's claim that "[i]f from Y's abstention from an activity X gains *only* a lessened probability of having his own border crossed (a crossing whose intentional performance is prohibited) then Y need be compensated only for the disadvantages imposed upon him by the prohibition of only those activities which are serious enough to justify prohibition in this manner."<sup>131</sup> What is appropriate compensation when X gains more from his prohibition of Y's act than a lessened probability of having his border crossed? Is he permitted to prohibit only if he shares the additional gains with Y? Does

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128. *See id.* at 82.

129. Nozick uses the phrase "disadvantaged relative to the normal situation." *Id.*

130. This question is intended to raise doubts about whether Nozick's entitlement theory of distribution satisfies the deletion and addition conditions which Nozick appears to believe are so important. *See id.* at 209-10.

131. *See id.* at 86 (emphasis added).

the answer depend upon whether his main reason for prohibiting Y's act was to gain the lessened probability of having his border crossed rather than the additional gains? These questions are especially important for Nozick who believes that those who voluntarily give up their rights to enforce their rights, agree to permit a central authority (what Nozick calls "a protective association") to have the sole right to enforce their rights for them, and choose to prohibit others from privately enforcing their rights against them by the use of risky procedures, must compensate those whom they prohibit for any disadvantages which result from the prohibition. If their sole motive for prohibiting is to lessen the probability that their borders will be crossed and their sole gain from the prohibition is a lessened probability of having their borders crossed, then it is relatively easy to determine what appropriate compensation is. They can remove the disadvantage a person suffers when he is prohibited from enforcing his rights by enforcing them for him. They can simply provide him with free protection.<sup>132</sup> What happens, however, when those who prohibit have an ulterior motive for prohibiting? They may, for instance, prohibit to attract new industry which is reluctant to locate in an area which permits private enforcement of the natural law. Are those whom they prohibit entitled to additional compensation in this case? It appears that Nozick must say that they are. He never tells us, however, what appropriate compensation would be.

The principle of compensation would appear to be unfair to the poor. It permits the prohibition of risky acts only when those who are disadvantaged by the prohibition are compensated for their disadvantages. Since the poor have fewer resources than the rich, it would appear that they must suffer greater risks. This is because they do not have the resources to pay the compensation needed to legitimize the prohibitions. Nozick appears to be bothered by the charge that the principle of compensation is unfair to the poor. This comes out in his discussion of whether a subsistence farming community could preventively restrain anyone:

Yes they may; but only if the restrainers give over enough in an attempt to compensate, so as to make about equivalent their own lessened positions (lessened by their giving up goods and placing them into the compensation pool) and the positions (with compensation) of those restrained. The restrained are still somewhat disadvantaged, but no more than everyone else. A society is *impov-*

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132. This is an oversimplification of Nozick's position. He is clear that a rich person who is prohibited from privately enforcing his rights must pay for whatever protection he receives. *Id.* at 112.

erished with regard to a preventive restraint if those restraining cannot compensate those restrained for the disadvantages they impose without themselves moving into a position that is disadvantaged; that is, without themselves moving into a position which would have been disadvantaged had only *some* persons been moved into it. Impoverished societies must carry compensation for disadvantages until the positions of those restrained and those unrestrained are made equivalent.<sup>133</sup>

There are two preliminary things to note about this passage. First, Nozick appears to be saying that the right to preventively restrain is possessed by a society. If he is to remain consistent, he must say that this right is possessed by any member of that society when he is acting alone in the state of nature.<sup>134</sup> Second, we should note that this quote occurs during a discussion of the problem of preventive restraint. He distinguishes between two types of cases where preventive restraint may seem appropriate. In one type, people "are viewed merely as mechanisms now set into operation which will (or may) perform wrong actions."<sup>135</sup> In these cases, we believe that the person is incapable of making a decision against acting wrongly and, therefore, it is appropriate to view them as we view any other risky act. In the other type, "the evil (it is feared) the person may do really does hinge upon decisions for wrong[ful behavior] which he has not yet made."<sup>136</sup> In these cases Nozick believes that deference to considerations of individual responsibility make preventive restraint unacceptable. Restraining people who are considered to be deranged falls into the first category, while restraining ordinary people through gun control laws or curfews falls into the second. Since Nozick's modification of the principle of compensation is certainly intended to apply to the first type of case, which is considered to be merely another type of risky act, we can fairly assume that he intends the modification to apply to all risky acts.

It follows that a person who prohibits another's risky act is only obligated to compensate the other for the disadvantages which result from the prohibition up to the point where further compensation will leave him more disadvantaged than the person whom he prohibits.

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133. *Id.* at 146 n. (emphasis in original).

134. Once we realize that the right to restrain is possessed by each person acting alone in the state of nature, we can see that the society can save a lot of money by adopting the following strategy. Each year a different member invokes his right to preventively restrain those who are considered dangerous. Since this person only has to pay those whom he prohibits up to the point where he is as disadvantaged as they are, and since he has fewer resources than the society considered as an individual, he will have to pay out much less than the society would if it issued the prohibition as an individual.

135. R. NOZICK, *supra* note 1, at 143.

136. *Id.*

This implies that a person who is extremely disadvantaged is permitted to prohibit, without any cost to himself, any risky act which is serious enough to prohibit. Is this fair to rich people who might be made radically worse off by prohibitions on their risky activities and who will not receive any compensation at all?

Suppose that some people who are extremely disadvantaged move into an area where there is a factory whose operation subjects them to such great risks of harm to their health that they suffer uncompensated for fear. It would appear that they can give the factory owner an ultimatum—either close down your factory, or change your methods of operation, so that we are not subjected to a level of risk which causes us to suffer uncompensated for fear. The factory owner realizes that it is not economically feasible for him to change to less risky procedures. What obligations do those who prohibit have to the factory owner? Even though he is made radically worse off by the prohibition, it seems clear that he will not be disadvantaged by it. With his expert entrepreneurial skills, he will certainly be able to find a job elsewhere. Even if he is disadvantaged by the prohibition, it is unlikely he will end up more disadvantaged than those who prohibit. Therefore, it would appear that those who prohibit have no obligations to him. As a moral person, he must simply take this change of fortune in stride.<sup>137</sup>

What if the factory owner wanted to buy the right to subject these disadvantaged people to these risks? There would be tremendous transaction costs associated with such an attempt and any new person who moved into the area would still have the right to prohibit without any costs to himself. There is a temptation to say that the fact that the factory was there first must make some difference. I do not see how Nozick can say this. Any justification for adopting a policy which gives weight to the fact that one party was there first would appeal to the beneficial consequences of adopting that policy and would certainly be incompatible with *I*.<sup>138</sup> It certainly appears that the disadvantaged people

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137. Are we not overlooking the plight of the factory workers? The prohibition might disadvantage them by depriving them of their only employment opportunity. It is unlikely, however, that Nozick wants to claim that a worker has a property right in his job which enables him to complain when another does a nonaggressive act which causes him to lose his job.

138. Any theory which says the appropriate way to assign entitlements in situations where people desire to perform nonaggressive risky acts is to evaluate the consequences of adopting public rules which make alternative assignments, can provide an explanation of why being there first should count for something. By assigning some weight to the fact that one party was there first, we provide him with some guarantee that the value of his property will not change due to circumstances beyond his control and, therefore, provide him an incentive to improve his property. For a relevant discussion, see Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

do have the right to prohibit the continued operation of the factory, and that it would be in their interests to exercise that right.

The principle of compensation, which at first appears to be unfair to the poor, turns out to be unfair to the rich. There is further evidence that it resolves conflicts between the rich and poor in an unsatisfactory manner. Our intuitive belief is that the amount of risk a person is permitted to impose on others without their consent is not a function of his wealth. A commitment to the principle of compensation forces us to change this belief. Let us focus on a risky activity, such as the use of a very efficient but dangerous manufacturing process, which is serious enough to justify prohibition. According to Nozick, it is permissible to prohibit a rich person from using this process because the prohibition will not disadvantage him. Now let us assume there is a group of disadvantaged people who, through charitable donations from others, have accumulated enough money to open a factory. Their aim in opening the factory is to escape their disadvantaged position and their success in doing this depends on their use of this very efficient but very risky process. Those who will be subjected to the risks which their use of the process creates are permitted to prohibit their use only if they compensate them for the disadvantages which result from the prohibition. In this case the compensation would involve paying them enough money so that they are no longer disadvantaged. This would be extremely expensive. Therefore, it is almost certain that these disadvantaged people will be permitted to operate their factory until they are no longer disadvantaged. At that time, others will prohibit their continued use of the risky process and force them to adopt the less risky processes their rich competitors use. Until that time, however, others will simply have to bear the risks and the uncompensated for fear which goes with it.

Nozick defends the view that the state is not permitted to use force to make the well-off help the needy (who, we can assume, are also disadvantaged).<sup>139</sup> Nevertheless, it turns out that his commitment to the principle of compensation leads him to the view that the well-off may, after all, have to "help" the needy. They will be the unwilling victims of the nonaggressive risky activities which the needy must be permitted to pursue in their attempts to escape their disadvantaged positions.

The point of this example, as was the point of the previous one, is that the problem of how to assign entitlements in cases of nonaggressive risky acts is an important social problem. People are not indiffer-

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139. See generally R. NOZICK, *supra* note 1, at 149-231.

ent to the solution insofar as their lives and jobs may be at issue. Furthermore, the principle of compensation assigns people inconvenient entitlements which lead to unreasonable resolutions of the conflicts between risk-creators and risk-bearers. Nozick might concede that people's natural entitlements in risky situations are inconvenient. He appears to admit as much, as we shall now see, when he discusses the problem of cumulative risk.

Nozick introduces the problem of cumulative risk in the following quote:

One action alone would not cause fear at all due to the threshold, and one action less would probably not diminish the fear. Our earlier considerations about fear provide a case for the prohibition of this *totality* of activities. But since parts of this totality could occur without ill consequence, it would be unnecessarily stringent to ban each and every component act.

How is it to be decided which below-threshold subsets of such totalities are to be permitted? To tax each act would require a central or unified taxation and decision-making apparatus. The same could be said for social determination of which acts were valuable enough to permit, with the other acts forbidden in order to shrink the totality to below the threshold. For example, it might be decided that mining or running trains is sufficiently valuable to be allowed, even though each presents risks to the passerby no less than compulsory Russian roulette with one bullet and  $n$  chambers (with  $n$  set appropriately), which is prohibited because it is insufficiently valuable. There are problems in a state of nature which has no central or unified apparatus capable of making, or entitled to make, these decisions.<sup>140</sup>

At this point, Nozick could say that we need emergent law bound principles, that these principles include a principle which enables us to evaluate the social value of each risky act, and that these law bound principles create the need for the principles the natural position adopts. Instead, he says that the problem of cumulative risk is merely an inconvenience of remaining in the state of nature.<sup>141</sup> It provides people in the state of nature with a reason to establish a central authority which is given, through their consent, the right to publish and enforce the laws needed to remove the inconvenience. These laws can only be enforced against those who consent to them. Will this voluntary approach to the problem of cumulative risk succeed in removing the inconvenience? There are reasons to believe that it will not.

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140. *Id.* at 73-74 (emphasis in original) (footnote omitted).

141. This becomes clear when he returns to the problem of cumulative risk. See *id.* at 89-90.

Assume that two protective associations are located across a lake from each other and that the prevailing winds dump the pollutants which the factories in one association's territory produce on to the territory of the other association and create a health hazard. Further assume that the cumulative effect of this dumping creates uncompensated for fear in the members of the other association but that no single factory dumps enough pollutants to justify prohibiting its continued operation. In this case, there does not appear to be anything that the protective association can legitimately do, without the express consent of the factory owners, to protect its members from this uncompensated for fear. It can, of course, require the polluters to pay for any actual damage they cause. However, that is all it can do.

This example brings out the important point that we are inclined to view the other protective association as an individual. We are inclined to say that it must coordinate the behavior of its members so that their collective behavior does not subject the members of another protective association to risks which cause uncompensated for fear. Nozick cannot say this. Each of the members of the protective association is, in the relevant sense, acting independently of the other members. Therefore, it is permissible to prohibit any act of any one of them only when it is, when considered by itself, serious enough to prohibit.

These considerations raise the following puzzle for Nozick. Assume that some person owns a group of factories which creates a risk to the people who live near them which causes those people to suffer uncompensated for fear. I believe Nozick would say that it is appropriate to consider the operation of the factories as the single activity of the person who owns them. If this is so, the people in the area can tell him that he must either reduce the level of risk which his factories create or shut them down. When he is given this ultimatum he decides that the most feasible thing for him to do is to sell his factories. He sells each to a different person who continues to operate the factory. Although the people in the area are subjected to the same level of risk as before, they are no longer able to protect themselves from the risk and the uncompensated for fear to which it leads. This is because none of the new factory owners operates a factory which creates a risk which is, when considered by itself, serious enough to prohibit. I do not see how Nozick can avoid the conclusion that mere change in ownership will cause this change in the lives of those who live near the factory.

Nozick could have adopted an intermediate position between his position, which rejects *F* and *I* and views the problem of cumulative

risk as a mere inconvenience of the state of nature, and the natural position. The intermediate position would involve accepting some version of the fairness principle. He interprets the fairness principle in the following manner:<sup>142</sup> Whenever a group of people  $G$  voluntarily cooperate by conforming their behavior to a public set of rules, then each person  $P$ , regardless of whether he is a member of  $G$ , has an *obligation* to follow the rules provided that; the rules are intended to apply to him, he has been informed of the requirements of the rules, he receives the benefits of the cooperation of others, and he is better off in the situation in which he receives the benefits of others and cooperates than he would have been in the situation in which he does not receive the benefits and does not cooperate. The principle of fairness is a principle about what *obligations* people have. By itself it is compatible with both  $F$  and  $I$ . When it is supplemented by a principle which says that an agent of  $G$  is permitted to enforce the obligations which arise under the principle, then it is incompatible with both  $F$  and  $I$ . Nozick gives counterexamples to the principle of fairness, and expresses his skepticism about the possibility of adding a fifth condition which will make the principle acceptable.<sup>143</sup> Furthermore, he is certain there is no way to modify the principle so that it gives rise to enforceable obligations.<sup>144</sup>

Nozick objects to the enforceable fairness principle because it is incompatible with  $F$  and  $I$  and because he interprets it as simply a macro-version of the unacceptable principle that it is permissible to give a person a benefit he has not consented to pay for and then force him to pay for it. He makes no effort to add a fifth condition in order to make the fairness principle a reasonable principle which gives rise to enforceable obligations. He simply asserts:

Perhaps a modified principle of fairness can be stated which would be free from these and similar difficulties. What seems certain is that any such principle, if possible, would be so complex and involuted that one could not combine it with a special principle legitimating *enforcement* within a state of nature of the obligations that have arisen under it. Hence, even if the principle could be formulated so that it was no longer open to objection, it would not serve to obviate the need for other persons' *consenting* to cooperate and limit their own activities.<sup>145</sup>

An argument may be made that since people will not agree on what

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142. This is, I believe, a fair statement of the principle he criticizes. See *id.* at 90-95.

143. *Id.* at 95.

144. *Id.*

145. *Id.* (emphasis in original).

obligations the modified principle gives rise to, there cannot be a special principle legitimating enforcement of those obligations. This argument loses all force when we recall the amount of disagreement that is bound to occur concerning what obligations the principle of compensation gives rise to.<sup>146</sup> Nozick insists, however, that the obligations which it gives rise to are enforceable within the state of nature.

How can we modify the principle of fairness so that it can be used to solve the problem of cumulative risk? The addition of the following condition will be a step in the right direction: The aim of the rule is to provide each person with increased security that the boundary defined by his natural rights will not be crossed. This fifth condition puts radical limits on when the principle of fairness gives rise to enforceable obligations. It generally appeals to the distinction between providing a person with a benefit and preventing a person from suffering a harm, and says that the principle gives rise to enforceable obligations only when the cooperative behavior is needed to prevent people from suffering harm. It provides the following solution to the problem of cumulative risk: Some people in the state of nature will almost certainly be bothered by the inconvenience of living in a system which permits so many risky acts that people suffer uncompensated for fear. Consequently, they will take the initiative of publicizing an enforceable rule which coordinates people's behavior so that the level of risk in the area is kept below the threshold which causes uncompensated for fear. They are much more likely to take this initiative when they know they are permitted to enforce their rule against people who do not consent to it. If they are not permitted to enforce the rule against the non-consenters, they have no guarantee that their rule will solve the problem of uncompensated for fear. The modified version of the enforceable fairness principle provides them with this guarantee.

There are two things we should note about this modified version of the fairness principle. The first is that it no longer seems appropriate to consider it to be merely a macro-version of the unacceptable principle that it is sometimes permissible to give a person something which he has not consented to pay for and then force him to pay for it. The following examples Nozick offers as counterexamples to the fairness principle now seem inappropriate:

On the face of it, enforcing the principle of fairness is objectionable. You may not decide to give me something, for example a book, and then grab money from me to pay for it, even if I have

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146. The difficulties associated with applying the principle of compensation are discussed above. See text & notes 123-32 *supra*.

nothing better to spend the money on. You have, if anything, even less reason to demand payment if your activity that gives me the book also benefits you; suppose that your best way of getting exercise is by throwing books into people's houses, or that some other activity of yours thrusts books into people's houses as an unavoidable side effect.<sup>147</sup>

Does a person who accepts the modified version of the enforceable fairness principle have to say that it is permissible to use force to make the person pay for the book? The answer is certainly "no." He might, however, say that in each of the following cases it is permissible to use force to make a person pay you for the costs you incurred in preventing him from suffering harm even though he never consented to pay those costs:

1. You find a person lying unconscious in the street. You hire an ambulance to take him to a hospital where the doctors save his life;
2. Your neighbor's windows are blown out in a storm while he is on vacation in a place where he cannot be reached. You board up his windows to prevent further damage, including damage caused by looters, to his home.

Nozick never discusses this type of case. An exchange in which one person pays another to prevent him from suffering this harm would be a productive exchange. *PE* does not apply, however, because these are cases where consent to cross another's boundary is impossible to obtain. In cases where consent is impossible to obtain, Nozick says that it is permissible to cross another's boundary provided you pay him at least full compensation for the harm which results from the crossing. However, in the above cases the crossings do not cause harm to the person whose boundary is crossed. In fact, the purpose of the crossings is to prevent the person whose boundary is crossed from suffering additional harm. The present issue is whether the person who takes the initiative to prevent this harm has a right to compensation for the costs he incurs in preventing it. The closest Nozick comes to discussing this issue is his discussion of the book-throwing example.

A person who wants to defend a modified version of the enforceable fairness principle will borrow two features from the above cases: first, that the principle only applies in cases where some are assuming costs to prevent harm to others; and that there are good reasons for discounting the relevance of whether the people who are protected from

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147. R. NOZICK, *supra* note 1, at 95.

harm voluntarily agree to pay the costs of providing that protection. In the two cases noted above, it was impossible to get the consent of the person who was protected. In the case of the modified version of the enforceable fairness principle, there are the following reasons for discounting the relevance of voluntary consent:

1. There will be very high transaction costs associated with any attempt to get the consent of each person who will receive the protection;
2. It is sometimes impossible to give each person who will receive protection the *actual* choice between receiving the increased protection and cooperating in the public system of rules which will provide that protection, and neither receiving the protection nor cooperating. This is because it is impossible to provide the protection to some without providing it to all and, therefore, each person has a self-interested reason to withhold his consent.

Furthermore, there are reasons for claiming that it is unfair for those who receive the benefits of others' cooperation to forego the assumption of the burdens of cooperation. To make this point, let us focus on the problem of cumulative risk. Those who cooperate provide all of the people in the area with a less risky environment. They have two complaints that it is unfair when others do not cooperate. One is that when others do not cooperate they increase the costs which those who cooperate must pay to keep the level of risk below the level which causes uncompensated fear. The other is that those who do not cooperate have a comparative advantage, insofar as they have more risky options available to them, in cases where they are competing with those who cooperate. What is absolutely certain is that a person who wants to defend a modified version of the enforceable fairness principle does not have to rest his case on the claim that it is permissible to throw a book into a person's house and then force the person to pay for the book.

The second thing to note about the modified version of the enforceable fairness principle is that some natural objections to it are objections which lead us in the direction of accepting the special principles which the natural position adopts. One objection might be that we want to know more about what properties the public rules which regulate people's risky activities have. This will lead us to adopt more explicit law bound principles for evaluating the laws that are needed to solve the problem of cumulative risk. Another objection is that it appears arbitrary to permit some to simply usurp the right to publish and enforce the laws that are needed. This will lead us to adopt special principles for evaluating procedures which determine which people are

specially entitled to publish, interpret, and enforce the laws which are needed. This suggests that once you concede that there is an enforceable version of the fairness principle you must go all the way and adopt the natural position.

I have shown that Nozick has not adequately defended his belief that there is no modified version of the enforceable fairness principle. Now I will argue that Nozick can use the principle of compensation to get certain conclusions he wants only if he appeals to a modified version of the enforceable fairness principle.

The principle of compensation says that it is permissible to prohibit a risky act only if those who are disadvantaged by the prohibition are compensated for these disadvantages. Is each person who gains increased security from the prohibition supposed to pay? Or, is it each person who, in fact, voluntarily endorses the prohibition and agrees to pay? Nozick discusses two applications of the principle of compensation. One is the case of a protective association which prohibits non-members, or independents, from privately enforcing their rights. The other is the case of prohibiting a poor person from driving a car in an auto-dependent society because he cannot afford to buy liability insurance. In the first case, the benefits of the prohibition are divisible so there is no problem about coercing some to provide benefits for others. Nozick notes that a protective association can offer its clients a choice between two policies:

Policy 1: those who buy this policy will receive protection against all violations of their rights by independents, except those which result from an independent's use of a risky procedure for enforcing his rights.

Policy 2: those who buy this policy will receive protection against all violations of their rights by independents including those which result from their use of risky procedures for enforcing their rights.<sup>148</sup>

The second policy will cost more. The difference will cover the costs of compensating independents for the disadvantages they will suffer by being prohibited from privately enforcing their rights against those who choose to buy the second policy. Those who do not buy it will not receive any protection against violations of their rights which result from the use of risky procedures by independents. They prefer to live with the risks and to collect compensation in those cases where the risky procedures wrongly punish them and, therefore, violate their rights.

In the second case, we are to imagine that there are some poor people who do not have the resources to purchase liability insurance

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148. *Id.* at 114.

in an automobile-dependent society. Nozick is puzzled about how to treat them:

Yet how can people be allowed to impose risks on others whom they are not in a position to compensate should the need arise? Why should some have to bear the costs of others' freedom? Yet to prohibit risky acts (because they are financially uncovered or because they are too risky) limits individuals' freedom to act, even though the actions actually might involve no cost at all to anyone else.<sup>149</sup>

Some forty pages later, he returns to give the solution to the puzzle he raised:

We canvassed, in chapter 4, the possibility of forbidding people to perform acts if they lack the means to compensate others for possible harmful consequences of these acts or if they lack liability insurance to cover these consequences. Were such prohibition legitimate, according to the principle of compensation the persons prohibited would have to be compensated for the disadvantages imposed upon them, and they could use the compensatory payments to purchase the liability insurance! Only those disadvantaged by the prohibition would be compensated: namely, those who lack other resources they can shift (without disadvantaging sacrifice) to purchase the liability insurance. When these people spend their compensatory payments for liability insurance, we have what amounts to public provision of special liability insurance. . . . Providing such insurance almost certainly would be the least expensive way to compensate people who present only normal danger to others for the disadvantages of the prohibition.<sup>150</sup>

This solution is arrived at much too quickly. We must look more closely at who it is that prohibits, what he prohibits, and who pays the compensation.

A person who drives an automobile imposes risks on all those who share the roads with him. This includes other drivers, their passengers, and pedestrians. The protective association can invoke the principle of compensation—a principle which each person acting alone in the state of nature is entitled to enforce—to prohibit poor people from driving without insurance, provided the association compensates them for the disadvantage of not being able to drive. How can it collect the money needed to pay the compensation by morally permissible means? It cannot tax all those who would benefit from the prohibition on the ground that it is only fair that they pay for the increased security which each will get as a result of the prohibition. This tax can only be justi-

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149. *Id.* at 78.

150. *Id.* at 115.

fied by appealing to some version of the enforceable fairness principle. If we concentrate on the case where the person we are prohibiting poses more than normal danger to others, so that provision of a free insurance policy is not the cheapest way to compensate him, then it may be impossible for the protective association to collect the money needed to provide the compensation by morally permissible means. It can only collect the money through voluntary contributions. But each potential contributor will consider whether the contribution which the association asks for is worth the benefit he will receive. Although it may be clear to each that he prefers situation *a*, where he pays  $m/n$  dollars (where *m* is the amount of compensation owed and *n* is the number of people who will receive the benefits of the prohibition) and receives the benefits of the prohibition, to situation *b* where he pays nothing and is subjected to the risks and fear which accompany no prohibition, there is no guarantee that each will voluntarily contribute  $m/n$  dollars. Many may hold out in the hope that the rest will be willing to pay just a little more. Consequently, they will get the benefits without paying anything. If Nozick wants to guarantee that these prohibitions of very dangerous acts will take place he may have to concede that, at least for the problem of how to collect the money that is needed to compensate a person who is disadvantaged by a prohibition on his risky act, there is an enforceable principle of fairness.<sup>151</sup>

What will happen in the case where the person the protective association prohibits poses only normal dangers to others? Here it might appear that there is a voluntary approach which will lead to "the public provision of special liability insurance." The protective association will offer its clients a choice between two policies. The more expensive policy provides those who buy it with insurance against any injuries a poor person might cause them in automobile accidents. The people who buy this policy voluntarily give up all claims to sue the poor person and agree to accept the compensation the insurance policy provides. The less expensive policy will not provide the people who buy it with any insurance against the injuries a poor person might cause them in automobile accidents. However, those who buy it will retain their natural rights to collect from the poor person for those injuries. Is it

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151. Nozick might still insist that he can reach the conclusions which he wants without appealing to any version of the enforceable fairness principle. He might argue that people would respond to the inconvenience of not having an enforceable version of the fairness principle by voluntarily giving the protective association the right to enforce some version of the fairness principle against them. The liabilities of this solution are discussed in the next section "Power and Principle." Or, he might argue that each would agree to give  $m/n$  dollars only if the others agree to give  $m/n$  dollars. See *id.* at 265-68. The transaction costs in reaching this agreement would be very high where the number of persons is large.

reasonable to believe that most will buy the more expensive policy and, consequently, provide poor people with what amounts to free liability insurance? We cannot answer this question until Nozick tells us what a person's natural rights are against a poor person who causes injury to another person. It seems clear to me, however, that he will have to say that he has the right to compensation for those injuries. In fact, it would seem to me that he has the right to appropriate that person's property in order to collect the compensation. I can see no way that Nozick can avoid these conclusions. If this is so, then the most economical thing to do might be to buy an insurance policy in the open market which provides you with protection from the injuries a poor person inflicts on you by the use of his automobile and which has a large deductible provision. By buying one with a large deductible you can get it quite cheaply. You should, however, be able to get the deductible back in court. The poor person has a car which must be worth something. You can sue him and force him to trade in his car or agree to pay some percentage of his wages until he has paid full compensation. I am not saying that I approve of this method. I am only saying that this would appear to be the economically feasible thing to do and, therefore, that Nozick has not provided us with any compelling reasons to believe that in a libertarian society there will be public provision of special liability insurance to poor people with automobiles.

There is one very important problem concerning how to apply the principle of compensation which we have not yet discussed. Is any person acting alone in the state of nature entitled to prohibit any act which subjects him to a risk of death and causes him to suffer uncompensated for fear provided he compensates the person he prohibits for any disadvantages which result from the prohibition? I do not see how Nozick can avoid the conclusion that he is so entitled. There are many reasons why a person would not invoke this right, unless the risk of death is more than negligible. It will cost him time and effort to make the announcements necessary to put the prohibition into effect, as well as time and effort to enforce it. He will also have to compensate any person he prohibits for the disadvantages which result from the prohibition. In addition, any person he prohibits might invoke the same right to prohibit against him. One person's use of the right to prohibit might lead to retaliatory uses of the right to prohibit and, thus, to a mutually disadvantageous position.

Therefore, it would appear that the *de facto* system in the state of nature, among people who accepted the system of entitlements which I have attributed to Nozick, would be similar, if not identical, to the system Nozick attributes to Charles Fried and rejects:

Charles Fried has recently suggested that people would be willing to agree to a system that allows them to impose "normal" risks of death upon each other, preferring this to a system that forbids all such imposing of risk. No one is especially disadvantaged; each gains the right to perform risky activities upon others in the pursuit of his own ends, in exchange for granting the others the right to do the same to him. These risks others impose upon him are risks he himself would be willing to undergo in the pursuit of his own ends; the same is true of the risks he imposes on others. However, the world is so constructed that in pursuing their own ends people often must impose risks upon others that they cannot take directly upon themselves. A trade naturally suggests itself.<sup>152</sup>

Nozick goes on to suggest that Fried's system is not the fairest system and he offers a system which he believes is fairer. Nozick's discussion is of interest to us for the following reasons: First, he denies that any person acting alone in the state of nature is entitled to prohibit any act which subjects him to a risk of death and causes him uncompensated for fear provided he compensates the person whom he prohibits for any disadvantages which result from the prohibition. Second, he appears to appeal to considerations of fairness to justify his denial.

In order to understand Nozick's argument against Fried we must first note that he believes that a natural rights theory can adopt one of three positions about people's entitlements in risky situations in the state of nature:

1. The action is prohibited and punishable, even if compensation is paid for any boundary crossing, or if it turns out to have crossed no boundary.
2. The action is permitted provided compensation is paid to those persons whose boundaries actually are crossed.
3. The action is permitted provided compensation is paid to all those persons who undergo a risk of a boundary crossing, whether or not it turns out that their boundary actually is crossed.<sup>153</sup>

He believes that this third possibility suggests an alternative that is fairer than Fried's system. In Nozick's words: "Putting Fried's argument in terms of an exchange suggests another alternative: namely, explicit compensation for each risk of a boundary crossing imposed upon another (the third possibility listed above). Such a scheme would differ from Fried's risk pool in the direction of greater fairness."<sup>154</sup> Before we can assess Nozick's claim that his alternative is fairer than

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152. R. Nozick, *supra* note 1, at 76 (footnote omitted).

153. *Id.* at 75-76.

154. *Id.* at 76.

Fried's risk pool we must note that Nozick interprets the third possibility so that a person is only entitled to compensation for having his boundary subjected to a risk of being crossed. He is *not* entitled to further compensation when his boundary is actually crossed. Consider the following:

Under the third alternative, people can choose the second; they can pool their payments for undergoing risk so as to compensate fully those whose boundaries actually are crossed. The third alternative will be plausible if imposing the risk on another plausibly is viewed as itself crossing a boundary, to be compensated for, perhaps because it is apprehended and hence imposes fear on the other. (Persons voluntarily incurring such risks in the market are "compensated" by receiving higher wages for working at risky jobs, whether or not the risk eventuates.)<sup>155</sup>

If people were entitled to compensation for having their borders crossed as well as for undergoing the risk of having their borders crossed, there would be no reason for them to pool their payments to assure that those whose boundaries are actually crossed receive additional compensation.

In order to better understand the third position, we should contrast it with the first position and the following position, which Nozick never considers: The action is permitted provided that compensation is paid to all those who undergo a risk of a boundary crossing and additional compensation is paid to all those whose boundaries are actually crossed. According to the first position the risk-bearer has the right to prohibit the risky act. The risk-creator is permitted to perform the act only if he pays the risk-bearer market compensation for the right to perform it. Different risk-bearers will demand different payments and some will insist on prohibiting the act. The third position is different from the first in that it does not give the risk-bearer the right to prohibit the act. The only way he can avoid undergoing the risk is to leave the area, at his own expense, in which the risk-creator is operating. If he stays in the area he must accept a certain amount for undergoing the risk. Nozick does not tell us how this amount is determined. We can see, however, that Nozick's analogy to the compensation which a person receives when he takes a risky job in the market is out of place. That person receives market compensation for undergoing the job's risks. Furthermore, it is likely that he will insist on both a premium for undergoing the risks and the right to additional compensation in case he is actually injured on the job.

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155. *Id.* (footnote omitted).

The way Nozick describes the third position the risk-bearer is only entitled to compensation for the fear which he suffers for undergoing the risk. The fourth position says that the risk-bearer is also entitled to compensation when his borders are actually crossed. It seems clear to me that the fourth position is fairer than the third. The third position gives the risk-bearer the choice of either pooling his compensation payment or not pooling it. If he pools it he will receive compensation in case his borders are actually crossed, if enough others also choose to pool their payments. He will, in essence, be choosing Fried's risk pool. If he does not pool his payment, then he will not receive any compensation when his borders are actually crossed. It is not at all clear that this is fairer than Fried's risk pool. Why, however, should he have to make this choice? Is the fourth position not clearly the fairest? I suspect that Nozick actually had the fourth system in mind when he introduced the third. It seems to be fairer, so long as we focus on a world in which enforcement has no costs, than either Fried's risk pool or Nozick's third position. To make Nozick's position as strong as possible, I will assume that he meant the fourth position when he described the third.

Does Nozick have any argument for why we should adopt the fourth position in cases where one person subjects another to a normal risk of death? I have suggested he should adopt the view that a person is entitled to prohibit any act which subjects him to a risk of death and which causes him to suffer uncompensated for fear, provided he compensates the person he prohibits for any disadvantages which result from the prohibition. Can he explain why his view is preferable to the view I have suggested he must adopt to the person who accepts the principle of compensation and believes that it should apply to all acts which create even a normal risk of death and cause uncompensated for fear? This person may be one who is meticulous about never doing anything which subjects another to a risk of death. He claims that it is unfair that others should be able to subject him to the risk of death at all. So far as I can tell Nozick never offers an argument which will convince this person, who takes Nozick's theory seriously, that the fourth position is fairer than the position I have suggested. He cannot argue for his position on the ground that my position will lead to a situation which will lead to disastrous consequences for all. This is for two reasons. One is that it would amount to giving up *I* as a constraint on how to assign entitlements. The other is that it simply is not true that the adoption of the position I have suggested will lead to disastrous consequences for all. There are compelling reasons to believe that

people will only invoke their right to prohibit in cases where they are subjected to a high risk of death. My conclusion is that Nozick's move towards the fourth (or, if he insists, the third) position proceeds without argument and appears to be incompatible with his commitment to the principle of compensation.

We can now turn to Nozick's brief discussion of how matters are complicated by the fact that there are high transaction costs associated with enforcing the fairest system of entitlements:

Putting Fried's argument in terms of an exchange suggests another alternative: namely explicit compensation for each risk of a boundary crossing imposed upon another (the third possibility listed above). Such a scheme would differ from Fried's risk pool in the direction of greater fairness. However, the process of actually carrying out the payments and ascertaining the precise risk imposed upon others and the appropriate compensation would seem to involve enormous transaction costs. Some efficiencies can easily be imagined (for example, keeping central records for all, with net payments made every n months), but in the absence of some neat institutional device it remains enormously cumbersome. *Because great transaction costs may make the fairest alternative impracticable, one may search for other alternatives, such as Fried's risk pool.* These alternatives will involve constant minor unfairness and classes of major ones.<sup>156</sup>

Nozick's point seems to be that even when people in the state of nature have the fairest system of entitlements there will be some unfairness, due to the high transaction costs of enforcing that system. More specifically, the high transaction costs of locating each person who subjects you to a risk and negotiating a fair price for being subjected to that risk will almost always deter you from attempting to collect compensation in cases where you are being subjected to a risk. What appears to be the ideally fair system turns out to be a system which is, in practice, radically unfair to those who are risk-bearers more often than risk-creators. It may be obvious to all that there is an alternative system of entitlements which is much fairer than the ideal system of natural entitlements when the distortions produced by high transaction costs are taken into account.

Can Nozick claim that any person acting alone in the state of nature is entitled to set up and enforce this alternative system? It seems clear to me that he cannot. This position would be incompatible with his commitment to *I*. Can he claim that each person has a duty to establish systems which minimize the amount of unfairness in the

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156. *Id.* at 76-77 (emphasis added).

world? He might claim this. Even if he makes this claim, however, he cannot make the further claim that it is permissible to use force to make a person act on this duty and cooperate in establishing these systems. When people's natural entitlements are inconvenient or unfair they can choose to adopt an alternative system of entitlements which is mutually beneficial through their voluntary consent.<sup>157</sup> Those who do not choose to change their natural entitlements, however, cannot be forced to do so. Others must treat them according to the laws of nature.

Even if we assume that considerations of fairness are relevant to determining what a person's entitlements are when we view each case of risk imposition as an isolated situation in an ideal world in which there are no transaction costs, they have no further role in Nozick's theory. If high transaction costs effectively prevent some from getting what they are entitled to that is simply tough for them. They cannot force others to cooperate in a scheme which comes closest to the distribution of benefits and burdens that would have occurred in a world in which there were no transaction costs. The others can simply insist on being treated according to their natural entitlements. Any movement away from these natural entitlements must be by their voluntary consent. I see no way for Nozick to avoid these conclusions.

It might appear that I am trying to commit Nozick to a precise view about what people's entitlements in risky situations are when his own view is that precision is impossible to come by. He can adopt one of three positions about what people's natural entitlements are in risky situations. These are:

1. They are clear and convenient so that people in the state of nature will have *no* reason to establish a central authority with the right, through their consent, to publish and enforce laws which define a different system of entitlements.
2. They are clear but not convenient so that people in the state of nature have a reason to establish a central authority with the right, through their consent, to publish and enforce laws which define a different system of entitlements which are mutually beneficial to all.
3. They are not clear and, therefore, people in the state of nature have a reason to establish a central authority with the right, through their consent, to publish and enforce laws which define a clear set of entitlements which are mutually beneficial to all.

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157. It is because people's natural entitlements are inconvenient in cases where they are subjected to the risk of death that each has a reason to sell his right to compensation to a company which buys such rights in case he is killed. By selling his right to compensation he is able to enjoy the benefits of having that right in his lifetime. It should be clear that the position which I am attributing to Nozick is consistent with his comments. *Id.* at 77-78.

It is clear that Nozick does not adopt the first position. I have interpreted him so that he adopts the second. It may appear to some, however, that he adopts the third. At one point, Nozick states: "Actions that risk crossing another's boundary pose serious problems for a natural-rights position."<sup>158</sup> A short time later he elaborates a little further on this:

It is difficult to imagine a principled way in which the natural-rights tradition can draw the line to fix which probabilities impose unacceptably great risks upon others. . . .

If no natural-law theory has yet specified a precise line delimiting people's natural rights in risky situations, what is to happen in the state of nature?<sup>159</sup>

These quotes suggest Nozick believes that the natural rights tradition, which is committed to *F* and *I*, cannot provide clear solutions to the problems of nonaggressive risky acts. However, these quotes appear before Nozick's presentation of the principle of compensation which is part of his attempt to solve these problems. It is for this reason that the reader simply does not know whether Nozick actually accepts the second or the third position above.

If our aim is to prove that Nozick's solution to the emergent problems of nonaggressive risky acts is not the optimal solution, then it does not matter which position we attribute to him. It would appear, however, that we put his theory in the most favorable light when we attribute the second position to him. The theory looks more defensible when it provides a solution to the emergent problems, even when its solution assigns counterintuitive and inconvenient entitlements, than when it concedes that it cannot, so long as it retains *F* and *I*, provide any solution at all. In either case Nozick is committed to the view that the "real solution" to the emergent problems of nonaggressive risky acts is whatever solution people "voluntarily" agree to in order to remove the inconveniences of remaining in the state of nature.

There are compelling reasons for saying that the optimal solution should not be one which essentially says that what is right is whatever people agree to. I now turn to these reasons.

#### POWER AND PRINCIPLE

I have argued that Nozick's commitment to *F* and *I* as constraints on how to solve the emergent problems of nonaggressive risky acts causes him to adopt one of the following positions, although it is not clear which one: People's natural entitlements in risky situations are

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158. *Id.* at 74.

159. *Id.* at 75.

not clear; and people's natural entitlements in risky situations are clear but not convenient. In this section I am going to illustrate some of the problems associated with adopting each of these positions. Their common flaw is that they lead to solutions people will not accept as impartial solutions. They essentially say that the correct solutions are whatever solutions people agree to. However, there is little reason to believe that people will agree to impartial solutions. It will become clear that we should search for the optimal solutions from among solutions which reject *F* and *I*, and which accept the natural position. Then we will find solutions with the property that people will view their entitlements in risky situations as based essentially on considerations of principle, rather than power.

There is one very obvious shortcoming with the first position. Let us assume that most people in the state of nature agree to establish a central authority with the right, through their consent, to publish and enforce laws which define people's entitlements in risky situations. Most believe that the establishment of a central authority is the rational response to the inconvenience of being in a situation in which their entitlements are unclear. Nevertheless, some people may not agree to establish the central authority. We will call these people "independents." What are their entitlements in risky situations? By hypothesis their natural entitlements are unclear. Is there any basis for the claim that the central authority can simply enforce its system of entitlements against them? It would appear that there is not. After all, these independents did not agree to those entitlements. Can Nozick argue that the central authority is entitled to enforce its system of entitlements against them, provided that it can establish that they are better off in the situation in which they comply with the requirements of the system and receive the benefits of others' compliance than they would have been in the baseline situation in which people's natural entitlements are unclear? Nozick's rejection of the enforceable fairness principle prevents him from using this argument. He must say, if he adopts the position that people's natural entitlements in risky situations are sometimes unclear, that there is no principled way for the central authority to deal with independents in those situations.

A second shortcoming of the first position is that it throws grave doubts on Nozick's claim that it is possible to provide a justification of the state. More specifically, it throws grave doubts on whether Nozick can claim that a state will arise from a nonstate situation in which people accept *his* moral theory by means which all, or even most, of those people would consider to be morally permissible. We will say

that a person accepts Nozick's moral theory when he accepts each of the following:

1. Moral theory is clear in just those places where Nozick says it is clear. This implies that he accepts *PE* and *UP*;
2. In places where moral theory is not clear, it must be extended in ways which are compatible with *F* and *I*; and
3. A person is morally bound to adhere to an agreement, which he has no natural duty to enter, only when he was not coerced to enter it.

In my view, two people can both accept Nozick's moral theory even though they accept different principles for solving emergent problems. For instance, two people can accept Nozick's moral theory even though they have different views about copyright or about people's entitlements in some risky situations. Each will have his own view about how the theory should be extended to solve those problems. Each may appeal to a different emergent constraint to show that his solution is the best one. They agree, however, that the correct solution must be compatible with *F* and *I*.

Will people who accept Nozick's moral theory and who offer different solutions to emergent problems establish a state by means which each considers to be morally permissible? Let us first note how it is possible for two people to disagree about whether an agreement between them arose by morally permissible means. The explanation is trivial in cases where the people accept radically different beliefs about when it is permissible for one person to use force against another. A perfectionist believes that it is permissible to use force to get another to increase the amount of intrinsic value in the world. A libertarian denies that it is permissible. Consider the case where a perfectionist threatens to use force against a libertarian to get him to help increase the amount of intrinsic value in the world and where the libertarian agrees only because he prefers to contribute than to fight. The perfectionist will believe that this agreement arose by morally permissible means because he believes that his threat to use force was morally permissible. The libertarian will deny that it arose by morally permissible means. He will insist that it was coerced from him by the perfectionist's immoral threat of the use of force. Even though he will concede that the perfectionist acted as his conscience dictated, he will insist that he has a just complaint against him. Furthermore, he will deny that he is morally bound by his agreement.

The same points can be made in cases where people agree on many moral beliefs, but sometimes disagree about when it is permissible for one person to use force against another. The disagreement

may be about what principle applies to a particular emergent problem or it may be about how to apply a principle which both accept. If one is in a position to impose his view of right on the other who prefers to agree rather than fight, it is doubtful that the other will believe either that the agreement arose by morally permissible means or that he is morally bound to abide by it. This is especially so when the disagreement is about a problem that is of particular importance to him so that he is not indifferent as to how it is solved, he believes that he has compelling reasons to support his solution, and he agrees to the other's solution only because he believes he has no chance of imposing his solution on the other. From his point of view his agreement was coerced from him by the other's immoral threat of the use of force and, since there is no natural duty to enter the agreement, he is not morally bound to it.<sup>160</sup>

We can again make the same points when we change the example so that neither is in a position to impose his solution to the emergent problem on the other and each prefers to compromise than to fight. Each may believe, so long as his power relative to the other remains the same as it was at the time of the agreement, that it is in his self-interest to abide by the compromise agreement in order to avoid the conflict that is certain to follow in case he breaks his agreement. He will not, however, believe that he is morally bound by the agreement. He entered it only because of the other's immoral threat of the use of force against him in case he tried to impose his solution, the correct solution, on the other.

What would happen in a state of nature situation in which people accepted Nozick's moral theory? What will people do when their common moral beliefs do not force a conclusion on how to solve an emergent problem concerning when it is permissible for one person to use force against another and they disagree about what the correct solution to the emergent problem is? Will they compromise because each believes that is preferable to fighting? Sometimes Nozick writes as if they will compromise:<sup>161</sup>

Not only does the day seem distant when all men of good will shall agree to libertarian principles; these principles have not been completely stated, nor is there one unique set of principles agreed to

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160. Will an independent who is prohibited from privately enforcing his rights believe that his procedure is unreliable? If he does not, then he will believe that his compliance with the prohibition was coerced from him by the protective association's immoral threat of the use of force.

161. There are other times when Nozick writes as if people would not compromise. See R. Nozick, *supra* note 1, at 98-99. He never dwells on what the implications are of the view he states for the problem of whether it is possible to provide a justification of the state.

by all libertarians. Consider for example, the issue of whether full-blooded copyright is legitimate. Some libertarians argue it isn't legitimate, but claim that its effect can be obtained if authors and publishers include in the contract when they sell books a provision prohibiting its unauthorized printing, and then sue any book pirate for breach of contract; apparently they forget that some people sometimes lose books and others find them. Other libertarians disagree. Similarly for patents. If persons so close in general theory can disagree over a point so fundamental, two libertarian protective agencies might manage to do battle over it. One agency might attempt to enforce a prohibition upon a person's publishing a particular book (because this violates the author's property right) or reproducing a certain invention he has not invented independently, while the other agency fights this prohibition as a violation of individual rights. Disagreements about what is to be enforced, argue unreluctant archists, provide yet another reason (in addition to lack of factual knowledge) for the apparatus of the state; as also does the need for sometimes changing the content of what is to be enforced. People who prefer peace to the enforcement of their view of right will unite together in *one* state. But of course, if people genuinely *do* hold this preference, their protective agencies will not do battle either.<sup>162</sup>

Here Nozick suggests that people will compromise, even with regard to such fundamental issues as copyright and patent, rather than fight. However, he never asks whether these people will consider the compromise solution to be morally binding. It seems unlikely that they will. If that is the case, then these people will not believe that the central authority which enforced the compromise has the legitimate authority to do so. They will reject the view that the central authority and the state ever arose by morally permissible means.

Now is a good time to recall some of the important social problems which appear to be emergent relative to Nozick's account of our clearest moral beliefs. They include:

1. What principles apply to the evaluation of distributions of natural resources and the benefits which result from their use when natural resources are no longer abundant?
2. Which acts that are done for legitimate purposes and which are certain to lower the value of another person's property amount to violations of that person's property rights and which do not?
3. When is it permissible to prohibit, rather than to permit provided that compensation is paid, an act which is certain to cross

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162. *Id.* at 141-42 (footnote omitted). *See also id.* at 330.

the boundary defined by another's rights when the crossing will be an incidental side effect of the act?

4. When is it permissible to prohibit, rather than to permit provided that compensation is paid, an act that creates a risk of crossing the boundaries defined by another's rights when the risk is an incidental side effect of the act?

If Nozick believes that moral theory is unclear about one or more of the above and that the correct solution to each, whatever it is, must be compatible with *F* and *I*, then he has no basis for his claim that he has used his moral theory to provide a justification of the state. People who found themselves in the state of nature, accepted his account of what is clear in moral theory, but disagreed about how to solve the emergent problems, would not believe that the compromise solutions to which they agreed, and which they permitted the central authority to enforce, arose by morally permissible means. If they wouldn't, then how can Nozick?

The argument which I have sketched for the conclusion that Nozick cannot use his moral theory to provide a justification of the state, does not apply if Nozick adopts the position that his moral theory does provide clear solutions, even if they sometimes assign counterintuitive and inconvenient entitlements, to the emergent problems. If he adopts this latter position he can say that people who found themselves in the state of nature and accepted his moral theory would voluntarily establish a central authority with the consensual right to publish and enforce laws which redefine their entitlements in a way which is beneficial to all. Since we are assuming there is agreement on what people's natural entitlements are, there is no basis for the argument that each will view the new system of entitlements as a compromise which is coerced from him by what he perceives as others' immoral threat of the use of force against him. Those who agree to the new system of entitlements, which the central authority is authorized to enforce, genuinely believe that it is an improvement over the system of natural entitlements which any person acting alone in the state of nature is entitled to enforce.

Furthermore, this position does not leave Nozick with the embarrassing problem of how the central authority is entitled to treat those independents who do not voluntarily choose to change their natural entitlements. Since moral theory is clear on what their natural entitlements are it must simply respect their natural entitlements. However, we should note that it must respect their natural entitlements even when respecting them causes great inconvenience to those who have voluntarily agreed to change their natural entitlements in their mutual relations. For example, it must refrain from using force to coordinate

the behavior of independents even when failure to coordinate their behavior will lead to a situation in which their independent actions, none of which causes uncompensated for fear, collectively produce a risk which does cause uncompensated for fear.

On what ground can we object to Nozick's adoption of the position that there are clear but inconvenient solutions, which are compatible with *F* and *I*, to some of the emergent problems? First, we can demand that Nozick produce these solutions. We can note that we are not satisfied with his claim that the problem of nonaggressive risky acts causes difficulties for the natural rights tradition and his further claim (without argument) that something like the principle of compensation must be right. The issue is whether *F* and *I* should be constraints on how to solve the problems of nonaggressive risky acts, and whether anything like the principle of compensation will do. For the purpose of argument, however, let us assume that he has provided us with clear solutions to the emergent problem of nonaggressive risky acts which define inconvenient entitlements. Why should we object to those solutions when Nozick can explain why people will voluntarily choose to change their natural entitlements to more convenient ones? Will we get the most reasonable solutions when we let people voluntarily agree to what they believe are the most reasonable ones? It seems clear to me that we will not.

We have already noted Nozick's belief that the fairest system of natural entitlements may, due to the high transaction costs of enforcing it, actually lead to a situation which is extremely unfair. More specifically, it might lead to a situation which is extremely unfair to those who are risk-bearers more often than risk-creators. Is there any reason to believe that people in the state of nature will agree to a new system of entitlements which will rectify the *de facto* unfairness which exists in the state of nature? Nozick might assume that each person has a natural duty to minimize the amount of unfairness in the world. People who accepted this natural duty might voluntarily agree to a new system of entitlements which is fairer, when we take account of the distortions caused by high transaction costs, than the system of natural entitlements. But if minimizing the amount of unfairness in the world is an important goal, then why can people not use force to assure its satisfaction? Why does Nozick not take the next step and say that there is an enforceable natural duty to establish a central authority which is entitled to publish and enforce laws which will, when we take account of the distortions produced by transaction costs, define the fairest system of entitlements and which are enforceable against people without their consent? Would this use of force against a person without his

consent go against the root ideas that each person is separate and inviolable and not a resource for any other person? It seems clear to me that it would not. It is only intended to correct the unfair distributions of benefits and burdens which result, according to Nozick's own account of fairness, because of high transaction costs. The only ground that Nozick can give for objecting to the use of force here is that it is incompatible with *F* and *I* and will interfere with his aim of providing a fundamental explanation of the political realm and an invisible hand explanation of the state. These are, as I have argued, no reasons at all. Unless Nozick concedes that it is permissible to use force to achieve the goal of achieving a fair solution to the emergent problem of nonaggressive risky acts, there is no basis for his claim that people will agree to a solution which is fair. Why should those who are the beneficiaries of the distortions produced by high transaction costs be expected to give up their benefits?

The main liability of the view that people's natural entitlements are inconvenient and that we should simply let people agree to new, more convenient, entitlements is that it leaves too much room for considerations of power to influence what agreements are reached. The only constraint it puts on what is a morally acceptable agreement is that the agreement must leave each party better off than he would be in the situation in which his natural entitlements are respected. If this baseline situation is an extremely intolerable one, then a person really has no choice but to accept almost any alternative situation, even one which is clearly designed to benefit others much more than it benefits him. When he accepts this system, however, he cannot complain that he is being treated unjustly. He did, after all, voluntarily agree to it.

Is it unreasonable to believe that people in the state of nature will, since they are of relatively equal power, agree to entitlements which are impartial? There are two responses to this. The first brings us back to our discussion of the distortions produced by high transaction costs. Why should those who benefit from these distortions be expected, in the absence of an enforceable duty to do so, to accept a system which takes these benefits away from them? One would expect them to accept a system which reflects their initial advantaged position. The second response is that if we want to assure an impartial solution, then why do we not search for enforceable first principles which will assure an impartial solution? Why are we running the risk that people might voluntarily accept solutions which have no claim to being impartial? If this involves giving up *F* and *I* and searching for an emergent constraint, then why do we not do that?

The point that people may agree to solutions which reflect the

relative power of each of the parties can be made more forcefully by focusing on the situation in which a central authority has already emerged and been in power for a long time. We will assume this authority has been authorized to publish laws which define its members' rights in risky situations and to provide protection to its members. A person's relation to this authority is the same, according to Nozick, as his relation with any private business.<sup>163</sup> Nozick states:

A person will swallow the imperfections of a package *P* (which may be a protective arrangement, a consumer good, a community) that is desirable on the whole rather than purchase a different package (a completely different package, or *P* with some changes), when no more desirable attainable different package is worth to him its greater costs over *P*, including the costs of inducing enough others to participate in making the alternative package. One assumes that the cost calculation for nations is such as to permit internal opting out. But this is not the whole story for two reasons. First, it may be feasible in individual communities also to arrange internal opting out at little administrative cost (which he may be willing to pay), yet this needn't always be done. Second, nations differ from other packages in that the individual himself isn't to bear the administrative costs of opting out of some otherwise compulsory provision. The other people must pay for finely designing their compulsory arrangements so that they don't apply to those who wish to opt out. Nor is the difference merely a matter of there being many alternative kinds of communities while there are many fewer nations. Even if almost everyone wished to live in a communist community, so that there weren't any viable noncommunist communities, no particular community need also (though it is to be hoped that one would) allow a resident individual to opt out of their sharing arrangement. The recalcitrant individual has no alternative but to conform. Still, the others do not force him to conform, and his rights are not violated. He has no right that the others cooperate in making his nonconformity feasible.<sup>164</sup>

There can be no doubt that Nozick's position is that the central authority can offer any package it chooses provided only that it gives each person the choice of opting out and living according to the principles of the law of nature. Let us examine the implications of this view.

A central authority, or protective association, can say to any person who lives within its area that if he wants to continue to receive its pro-

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163. *Id.* at 25.

164. *Id.* at 321-22. Nozick also discusses the problem of what the liability of a corporation is to those who voluntarily associate with it. *Id.* at 133-34.

tection, he must obey its laws. There are no moral constraints on what these laws may be. They may, for instance, include any one of the following laws: No person is permitted to practice Catholicism; every person must donate 10% of his income to the poor; no person is permitted to own a gun without the express consent of the central authority; people who live near factories must assume the risks and, therefore, receive no compensation in case their borders are actually crossed because of the factories' use of risky procedures. The central authority cannot force people to obey these laws. That is, it cannot say to them that either you obey these laws or you will be punished. It can, however, offer them the following ultimatum: Either you accept our total package, which includes obedience to these laws and the provision of a protection policy, or you become an independent and live according to the laws of nature. Nozick's view is that no matter how unattractive the choice of being an independent is, a person cannot complain that he is being treated unjustly when he is given this ultimatum. This is because his choice will be, in Nozick's view, a voluntary choice. This follows from Nozick's beliefs that people do not have duties to collectively cooperate to prevent him from having to make this unpleasant choice, and his actual choice is not influenced by an immoral threat of the use of force by any person.<sup>165</sup>

Will a central authority be able to get away with offering outrageous packages and retaining its clientele? Remember that we are asking this question with regard to a central authority which has been operating for a long time. It has developed a highly sophisticated system for providing its clientele with protection against breaches of the law as well as a highly sophisticated procedure for determining guilt and innocence. It must in principle permit people to opt out of the package it offers and to either protect their own natural rights or establish an alternative association for protecting their rights. It has the right, however, to prohibit the use of any procedure for determining guilt and innocence which it believes is unreliable. According to Nozick, it will almost certainly prohibit the private enforcement of one's rights.<sup>166</sup> When we consider the joint facts that it would be very expensive to set up an alternative procedure which is as sophisticated as the central authority's, and that any people who attempt to set one up must take the risk that the central authority might prohibit its use, it seems quite reasonable to conclude that an alternative association will not arise. A person who decides to reject the package will be prohibited from en-

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165. For evidence that this is a fair account of Nozick's beliefs about when a choice is voluntary, see *id.* at 162 n., 169, 263-64.

166. *Id.* at 109.

forcing his own rights and will be provided with a protection policy. We cannot say how attractive this option is without examining exactly what this policy looks like. If it turns out to provide a person with very little protection, then it does not seem unreasonable to say that the central authority can get away with offering some pretty outrageous packages. This is especially so if the package is intended to harm the members of an unpopular minority group.<sup>167</sup>

Nozick never offers a detailed discussion of what kind of protection must be provided to those who are prohibited from enforcing their own rights. He tells us that they must be compensated for being disadvantaged by the prohibition and suggests that it will do to provide them with an unfancy protection policy which is at least as good as the cheapest one the central authority offers.<sup>168</sup> We need more detail than this. Nozick must answer the following types of questions: Will independents be provided with the right to counsel? Will independents be provided with the right of appeal? Will independents have the right to subpoena members of the protective association as witnesses in disputes between them and members of the association? How much will the central authority spend to investigate when an independent claims that his rights have been violated? Unless Nozick can defend answers to these questions which indicate that independents will receive adequate protection of their natural rights he will not be able to block my claim that the central authority will be able to get away with offering some pretty outrageous packages. There appears to be nothing in the book which suggests that Nozick can provide the answers he needs.

I do not believe that I have to say more to make the point that there are grave liabilities with the view that people's natural entitlements are inconvenient and that whatever entitlements people voluntarily agree to in order to remove these inconveniences are morally acceptable. However, the reader should be aware that I have offered two distinct arguments. The first is that there is no reason to believe that people will reach agreements which have any claim to being impartial. To the contrary, people will probably reach agreements which reflect their relative bargaining positions. Thus, people will consider their relations with regard to the problem of nonaggressive risky acts

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167. The reader should now reconsider Nozick's claims that the nightwatchman state is neutral between its citizens. *Id.* at 33, 271-74. Although there may be market considerations which mandate that a protective association must offer a neutral package when it first goes into business, these considerations almost certainly disappear when it becomes the dominant association. On Nozick's view there are no moral reasons why it must remain neutral. Control of the state is much more of a prize than Nozick realizes.

168. *Id.* at 113.

to be based on considerations of power rather than principle. This argument clearly assumes that people's natural entitlements are inconvenient.

The second argument does not even have to assume that people's natural entitlements are inconvenient. It brings attention to the fact that any central authority which emerges may, as part of the total protection policy it offers, ask any person to give up any one of his natural entitlements. This person has no complaint when he is given the choice of giving up his natural entitlements and receiving a good protection policy and becoming an independent. The people who control the central authority can, with some reason to expect success and with no fear of being unjust, create a society which answers to their interests and whims and which shows little concern for the interests of others. It becomes clear that what people's natural entitlements are—whether they are convenient or inconvenient—ends up playing a very small role in what the just society looks like. The just society may well be a society in which people view their relations as essentially based on considerations of power rather than principle. Do we want to say that the optimal solutions to the emergent problems can lead to a society with this property? It seems clear to me that we do not. We can avoid it, to some extent at least, if we accept solutions which reject *F* and *I*, and which adopt the natural position.

What are the advantages of solutions to emergent problems which reject *F* and *I* and adopt the natural position? With regard to the emergent problem of nonaggressive risky acts one obvious advantage is that they drop the artificial assumption that we must view each non-aggressive risky act as an isolated act between two people in a state of nature. Once it becomes clear that the root ideas of Nozick's theory do not force a conclusion on how to assign entitlements, there is no basis, other than an irrational commitment to *F* and *I*, for retaining the assumption. Instead, we should view the problem of assigning entitlements in risky situations as a problem of evaluating the consequences of adopting public systems of rules which assign those entitlements. This approach takes account of the following important facts:

1. Each person is, in the course of his life, both a risk-creator and a risk-bearer.
2. The system of entitlements which is adopted will have direct effects on a person's life prospects by influencing the chances that he will be a victim of another's risky act and by influencing the opportunities he will have to pursue his own ends.
3. The system of entitlements which is adopted will have an indi-

rect effect on a person's life prospects by influencing the level of productivity and the level of innovation in his society.

4. Any reasonable solution to the problem of how to assign entitlements must take account of the transaction costs of enforcing that solution.

For these reasons it is appropriate to view the problem of assigning entitlements from a perspective which sees each person as both a risk-creator and a risk-bearer, and which looks at the long term consequences of adopting a public system of rules which assign entitlements.

A person who accepts Nozick's root ideas, but who rejects *F* and *I* as constraints, *might* suggest the following solution:

It is permissible to prohibit a nonaggressive risky act, rather than permit it provided that compensation is paid, whenever it is prohibited by a public rule, which is part of a system of public rules which has the following properties: First, any person whose border is crossed as a result of another's nonaggressive risky act is compensated for the crossing. Second, any person who is disadvantaged as a result of a prohibition of a nonaggressive risky act is compensated for the disadvantage. Third, the system is effectively and impartially enforced; and fourth, the system maximizes utility.

I do *not* claim that this solution is the optimal solution. I only suggest it as an example of a solution which may be appealing to a person who accepts Nozick's account of the root ideas of the correct moral theory.<sup>169</sup> This solution is *not* a utilitarian solution to the problem of nonaggressive risky acts. Utilitarian considerations only come into play after we have assured that those whose borders are crossed by others' risky acts are compensated and that those who are disadvantaged by prohibitions of their nonaggressive risky acts are also compensated.

It is clear that people who accept this solution, which is incompatible with both *F* and *I*, will often disagree about which laws optimally satisfy the principle to which it appeals. Principles which reject *F* and *I* do not remove moral disagreement. They do, however, handle it in a way which makes it plausible to claim that people who accept them will view their relations as based essentially on considerations of principle rather than power. First, people who accept them will also accept special political principles which evaluate procedures for determining which people are entitled to publish, interpret, and en-

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169. I have stated the principle so that it does not identify which people are liable to compensate those whose boundaries are crossed and which people are liable to compensate those who are disadvantaged by prohibitions on risky acts. One might argue that Nozick's root idea of separateness forces us to assign the first liability to those who cause the boundary crossings and the second liability to those who benefit from the prohibitions.

force the laws which are intended to satisfy the principles. These special principles will guarantee each person the right to express his opinion about which laws optimally satisfy the principles and to have a vote in determining which laws should ultimately be adopted. Perhaps it is here where democrats invoke the view, a view which Nozick mocks, that each person has a right to a say over what affects him.<sup>170</sup> Once we accept that there are principles which are incompatible with both *F* and *I* and that there is room for reasonable disagreement about which laws optimally satisfy them, then it is plausible to claim that each person should have a right to some say over which laws are adopted. This right to have a say becomes especially important when we recognize the natural tendency for each person to apply common principles in a way which advances his interests. The right to have a say provides each with some protection that others will not apply principles in ways which disadvantage him. It enables him to express his views about why the principle is being improperly applied and to demand an answer in the public forum.

It is too optimistic to believe that there will ever be complete convergence of opinion, even after each person has heard every other person's point of view and votes his conscience, about which laws optimally satisfy the common principles. This is so in part because there may be reasonable disagreement about what the consequences of adopting different systems of public rules will be. Another reason is that it may be impossible for people to be completely impartial in applying the principles. What is important is that such principles do not leave too much room for disagreement about which laws optimally satisfy them. On this score, the principle I have suggested is much better than the principle which simply says that we should adopt the public system of rules which maximizes utility. However, it would be preferable to have a principle which evaluates the consequences of laws in terms of more specific concepts than maximizing utility. This principle would leave less room for partiality to work behind the scenes and would lead to more convergence of opinion. It seems reasonable to say that people will view their relations as based essentially on considerations of principle rather than power so long as the principle fixes certain critical features of just laws, and the laws which are enforced are the outcome of the use of just procedures. Certainly, it is more reasonable to believe that they will view their relations as based on considerations of principle rather than power, compared to the people in Nozick's system. In that system people are not guaranteed any right to a say over which laws

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170. See *id.* at 268-71.

apply to them and their natural entitlements have little influence on what those laws are.

We now come to the second significant feature of how the natural position handles the disagreement which is bound to occur over which laws optimally satisfy principles which are incompatible with *F* and *I*. It appeals to special principles for the problem of when a person is morally bound to obey a law which results from the use of just procedures. These principles will imply that a person is sometimes morally bound to obey a law which results from just procedures even though that law does not optimally satisfy the principle which it is intended to satisfy. People adopt the perspective that they must sometimes tolerate laws which they do not believe are optimal because the benefits of having just procedures intended to produce optimal laws will be available to all only if each accepts the burden of obeying laws which he believes are reasonable but not optimal. Even Nozick is willing to concede that people who accept common principles must sometimes tolerate applications of those principles which they do not believe are optimal:

It seems that persons in the state of nature must tolerate (that is, not forbid) the use of procedures in the "neighborhood" of their own; but it seems they may forbid the use of far more risky procedures. An acute problem is presented if two groups each believe their own procedures to be reliable while believing that of the other group to be very dangerous.<sup>171</sup>

Similarly, people who accept principles which are not compatible with *F* and *I* must tolerate laws which are in the "neighborhood" of those they believe are optimal.<sup>172</sup> However, they do not have a duty to obey those they believe are grossly unjust. Furthermore, they have the right to criticize any law, even those they are bound to obey, which they do not believe is optimal.

## CONCLUSION

Nozick's state of nature approach to the problem of what principles

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171. *Id.* at 98.

172. We are now in a position to see that a person who adopts the natural position *must* appeal to an enforceable version of the fairness principle at two points. First, he must appeal to it in order to explain why a person is sometimes obligated to obey a law which is intended to satisfy a law bound principle even though he does not believe that it is the optimal law for satisfying the principle. Second, he must appeal to it in order to solve the problem of raising the money needed to pay the costs of operating the just institutions which publish, interpret, and enforce the correct law bound principles. A person who accepts the natural position can say that the only just state is the night watchman state. That is, he can say that the just state is not permitted to use force in the pursuit of any paternalist, perfectionist, or egalitarian goals. He will insist, however, that the just state is permitted to use force to make each person pay his fair share in maintaining just institutions.

characterize the just state begins with the assumption that none of the first principles of justice apply directly to the evaluation of institutions. I have argued that Nozick has not established that we should retain this assumption. My argument has been internal to Nozick's theory in the sense that I have given Nozick his account of our clearest moral beliefs. I have argued that even when we accept his account of our clearest moral beliefs we are not compelled to accept his solutions, which are compatible with *F* and *I*, to the difficult moral problems which are emergent relative to those clear beliefs. Furthermore, I have argued that once we see the limitations of his account of our clearest moral beliefs we must search for an emergent constraint which can be used to evaluate the competing solutions to the emergent problems and pick out the optimal ones. I have argued for an emergent constraint which focuses on the desirability of having a society in which people view their mutual relations as based essentially on considerations of principle rather than power. Once we adopt this constraint it becomes clear that the optimal solutions to the emergent problems will appeal to principles which apply directly to the evaluation of institutions. One reason is that there are grave liabilities associated with the alternative view that each person's membership in the state is essentially a matter of voluntary choice. My conclusion is that even when we begin the search for the principles which characterize the just state by focusing on moral problems in a preinstitutional state of nature, we end up with the view that some of the main problems of justice are problems of institutional design.